No. 85-610

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

ALBERT R. PIAROWSKI,

*Petitioner,*

*vs.*

ILLINOIS COMMUNITY COLLEGE DISTRICT 515, PRAIRIE STATE COLLEGE; RICHARD CREAL, President of Prairie State College; H. ROBERT ANDREWS, Vice-President for Instructional Services, Prairie State College; DR. JAMES H. GRIFFITH, MRS. LILLIAN J. BLECH-SCHMIDT, MRS. ALMA L. MARTIN, MR. PAUL C. FRAKES, MR. JOSEPH HAWKINS, MR. CHARLES R. MASON, and MR. MICHAEL F. SHANLEY, members of the Board of Trustees of Prairie State College; all individually and in their official capacity, THOMAS G. GARDINER, MICHAEL R. MONTELEONE, DAVID M. AMADIO, JAMES S. TEYKL, and CARL TRIEBOLD, all in their official capacity as Members of the Board of Trustees of Frairie State College,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a public community college violates a faculty member's First Amendment rights of expression and academic freedom by removing from the college art gallery works of art which were exhibited pursuant to established academic, artistic and institutional practices, on the grounds that suppression of the works is necessary to protect the public image of the college to avoid affront to persons who perceive the works to be offensive to blacks and women?

2. Whether a limited public forum for artistic expression, governed by First Amendment standards, has been created where a public community college designates and designs a campus art gallery to house exhibits of student, faculty, and outside artists, and where such exhibits have taken place over a period of years in accordance with established academic, artistic and institutional practices of art exhibition?

3. Whether the offer of a small, remote alternative display area is sufficient to cure censorship which violates the First Amendment, where the removal of the art from the college art gallery to the proposed alternative site is undertaken for the purposes of suppressing the perceived viewpoint of the art and of decreasing the visibility and accessibility of the art?

4. Whether a public community college violates the First Amendment by failing to provide constitutionally mandated procedural safeguards to a faculty member whose protected artistic expression is censored and restricted?

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ILLINOIS COMMUNITY COLLEGE DISTRICT 515, PRAIRIE STATE COLLEGE; RICHARD CREAL, President of Prairie State College; H. ROBERT ANDREWS, Vice-President for Instructional Services, Prairie State College; DR. JAMES H. GRIFFITH, MRS. LILLIAN J. BLECH-SCHMIDT, MRS. ALMA L. MARTIN, MR. PAUL C. FRAKES, MR. JOSEPH HAWKINS, MR. CHARLES R. MASON, and MR. MICHAEL F. SHANLEY, members of the Board of Trustees of Prairie State College; all individually and in their official capacity, THOMAS G. GARDINER, MICHAEL R. MONTELEONE, DAVID M. AMADIO, JAMES S. TEYKL, and CARL TRIEBOLD, all in their official capacity as Members of the Board of Trustees of Prairie State College,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Albert R. Piarowski, respectfully prays that a writ of certiorari be issued to review the decision in this case of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois is unreported. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 759 F.2d 625 (7th Cir. 1985). The order of the Court of Appeals which denied rehearing en banc is also reported at 759 F.2d 625. Both opinions and the order denying rehearing are reproduced in the Appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1985. The timely application of appellant below, Petitioner here, for rehearing, and his suggestion for rehearing *en banc*, were denied on May 10, 1985. On August 5, 1985, Justice Stevens of this Court entered an order extending the time to file petition for certiorari to and including October 7, 1985. The jurisdictions of this Court is invoked pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Petitioner Albert Piarowski, an artist, is a full-time member of the art department faculty of Prairie State College (PSC). (Tr. 25).[1] As of March 1980, the date of the events at issue in this case, he had served as Chairman of the Art Department of PSC and its predecessor institutions for 23 years. (Tr. 28).[2] Respondents are Prairie State College, members of the PSC Board of Trustees, Richard Creal, President of the College, and H. Robert Andrews, then PSC Vice-President for Instructional Services.[3] Prairie State College is a public community college of 6000 students. (Tr. 804, 927-928).

This controversy arose in March, 1980, when Piarowski and three other art faculty members of the college exhibited their works in the annual faculty art exhibit. Piarowski chose to exhibit some of his most recent works, eight stained glass panels, in the Gallery on the first floor of the college's main building. After ten days of exhibition, in response to community complaints, the respondents summarily removed three of Piarowski's eight works. They offered Piarowski the alternative of displaying the three works in a fourth floor room that was designated for the display of photography and contained a

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[1] Trial in this case was held, without a jury, on July 13, 14, 15, 16, 19, and 20, 1982. References to pages of the transcript of the trial are designated "Tr. _____." All exhibits referred to were admitted into evidence by the District Court. App. at 3a.

[2] On or about January 25, 1983, Piarowski resigned his duties as Chairman and Gallery Coordinator and continues as a full-time member of the PSC art department faculty.

[3] At the time this controversy arose, Lillian J. Blechschmidt, Paul C. Frakes, Joseph Hawkins, and Michael F. Shanley were members of the Board of Trustees of Prairie State College and were named as defendants in their individual and official capacities. They have been succeeded in office by Thomas G. Gardiner, Michael R. Monteleone, David M. Amadio, James S. Teykl, and Carl Triebold, who are added as respondents in their official capacity. Rule 25(d)(1), F.R.Civ.P.

previously scheduled exhibit. The exhibiting artists rejected this proposal and closed the exhibit.

Since 1960, as Art Department Chairman, Piarowski had been responsible for selecting artwork for display at the college. (Tr. 29-30). During this time Petitioner selected artwork for display according to aesthetic criteria. (Tr. 30). He was never informed by his superiors that his choice of artworks was subject to review (Tr. 30), never received art exhibition guidelines from the college administration (Tr. 39), or any notice that there were limits on his discretion to choose works for exhibit. (Tr. 42).

In late 1975, after construction of PSC's present building, Piarowski consulted with the college administration on the establishment and design of a fine arts gallery for PSC. (Tr. 46-56, 635, 781). The space selected for the gallery was a 21 by 27 foot alcove adjacent to the college's main floor mall area. (Tr. 951, Pl. Ex. 32). The main floor mall is a large open space measuring approximately 165 by 100 feet. (Id.). Around its perimeter are a variety of facilities, including a learning center, computer center, records department, cashier, book store, and student activity center containing pool tables and video games. (Tr. 105-106). The mall area itself has been used for PSC graduation ceremonies and other gatherings. (Tr. 996-997).

Upon establishment of the PSC art gallery in 1976, Piarowski and respondent Andrews reached agreement that Petitioner and another faculty member would serve as gallery coordinators. (Tr. 73-74). Among the responsibilities of the gallery coordinators were selection and acquisition of artwork, installation and removal of exhibits, publicity, and coordinating exhibits with other institutions. (Tr. 67-69, Pl. Ex. 11J).

Under Piarowski's direction, the PSC gallery exhibited the art works of students, faculty members, and artists from outside PSC who were invited to exhibit their works. (Tr. 74-75). In

performing his duties of gallery coordination, petitioner employed either of two established, traditional methods of art selection: the juried method or the invitational method. (*Id.*; 468-69.) For student works, he employed the juried method in which PSC art teachers selected art from the works created in their classes on the basis of artistic quality. (Tr. 76).

Under the invitational method of selecting art for exhibition, a curator, (here Piarowski as gallery coordinator), determines which artists will participate in the exhibition. The artists themselves then choose the pieces to be displayed from their own works. (Tr. 469). Piarowski employed the invitational method of exhibition when displaying the works of faculty and invited outside artists. (Tr. 76-79). Piarowski did not approve in advance the works chosen for display by faculty or outside artists. (Tr. 74-80).

At trial Piarowski offered the expert opinion testimony of Reinhold Heller, Professor and Chairman of the Art Department at the University of Chicago. Dr. Heller testified that the invitational method of exhibition has been in existence since the sixteenth century. (Tr. 466). He further testified that it is standard practice for an institution to provide a forum for its teaching faculty to display their works, that every college or university he knows of does so, and that it is standard practice for faculty exhibits to be invitational in nature. (Tr. 467-473).

In each year from 1976-1979, faculty art exhibitions in the gallery proceeded under Piarowski's direction, in accordance with standard exhibition practice. (Tr. 89). Art with sexually explicit subject matter had been exhibited in faculty shows prior to 1980 and had not been removed from the gallery or otherwise censored. (Tr. 82-89, Pl. Ex. 14). In these and other exhibitions there was never any prior or subsequent review of works by PSC officials. (Tr. 739). In addition, respondent Andrews testified that to his knowledge PSC had never had any defined policies regarding selection of material for display, and

that there have never been any policies or procedures regarding the removal of materials from the art gallery. (Tr. 937-948).

On March 3, 1980 Piarowski and the three other full-time Art Department faculty members placed approximately 25 works of art in the gallery for the 1980 faculty exhibition which was to continue for three weeks. (Tr. 123, 207). Petitioner exhibited eight of his most recent stained glass works, five abstracts and three representationals. (Tr. 94-95). Two of the three pieces, which are the subject matter of this litigation, were inspired by Aubrey Beardsley's illustrations of an edition of Aristophanes' *The Lysistrata.* (Tr. 114-117, 123). The third piece was an interpretation of a drawing attributed to Beardsley, but not actually his work. (Tr. 163).

Shortly after the faculty exhibit opened, respondent Creal received a petition from twenty female students characterizing the stained glass works as "pornography." (Tr. 792-795, Pl. Ex. 8A). In addition, the college director of public relations received three or four telephone calls from unidentified students (Tr. 302, 310), and PSC officers Creal and Andrews each testified to receiving a single personal complaint from a student. (Tr. 998; Tr. 768, Pl. Ex. 28 at 84-85). Creal testified that two secretaries in his office complained also, following receipt of the student petition. (Tr. 810-811). The college public relations director reported indirect complaints that cleaning women retained by the college found the works offensive. (Tr. 302, 309, 339). In addition, the record contains reference to unspecified numbers of complaints from unidentified individuals (Tr. 310, 811-812) and to objections from a group of black ministers in the surrounding communities who had never viewed the works. (Tr. 591-592; 660-661; 703).[4]

[4] The Court of Appeals stated that it was not clear that the clergymen actually had seen the windows. 759 F.2d at 628, App. at 21a. The record clearly indicates that the ministers never viewed the works.

The complaints summarized above were the information available to respondents Creal and Andrews and other vice-presidents of the college when they attended a regularly scheduled meeting on March 12, 1980.[5] At this time, the faculty exhibit had been on display for 10 days of its scheduled three week duration. At this meeting PSC officials determined that Andrews would direct Piarowski to remove the three Beardsley inspired works to a fourth floor photography gallery or Andrews would permanently remove the works from display. (Tr. 771-772).

Later that same day, Andrews, as Piarowski's superior, ordered him to remove the three works. (Tr. 124, 769). Piarowski responded that he could not fragment the faculty exhibition. (Tr. 124). The next day, March 13, Andrews ordered Piarowski to remove the three works and offered the fourth floor photography gallery as an alternative forum for display of the three works.[6] (Tr. 124). Piarowski replied that he could not remove three works from the exhibit without first conferring with the other faculty exhibitors. (Tr. 124-126). In

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[5] After the stained glass works had been removed from the exhibit, the PSC Board of Trustees received a letter from a black civic leader, characterizing the works as racist and demeaning to black women. (Pl. Ex. 8B, Tr. 585-586, 592-594). Respondent Alma Martin, a black woman who is a member of the Board of Trustees, also testified that the works were racist (Tr. 690) and distasteful to black women. (Tr. 687). Martin did not view the works on display in the gallery, but saw them privately in Andrews' office, at her own request, after they had been removed from the exhibit. (Tr. 661-662).

[6] The record shows that the fourth floor gallery had been designated a photography gallery, was smaller than the main floor gallery, and was booked with exhibits. (Tr. 151-152, Pl. Ex. 6). The record shows also that respondents considered the fourth floor gallery less visible and less accessible to potential gallery patrons. (Tr. 311-313, 903).

support of this position Piarowski cited an Art Department policy against fragmenting an exhibit by removing some works. (Tr. 125-126).

Dr. Heller testified that there is artistic value in faculty art exhibits and in the artists' selection of their own works for display. (Tr. 465-467). He also confirmed that the policy against fragmentation is sound standard exhibition policy. (Tr. 472). Dr. Heller testified that fragmenting an exhibition is considered an unethical art exhibition practice. He stated further that it is standard policy that an exhibition which has been partially destroyed after the exhibition has been placed on display should be closed. (Tr. 472).

Immediately thereafter Andrews responded, stating that the three works would be removed from the gallery on Friday, March 14, 1980. (Tr. 126, Pl. Ex. 3C). The stained glass pieces were in fact removed from the exhibit that day. (Tr. 127). On Monday, March 17, 1980, the exhibiting faculty artists met and voted to close the exhibit because the removal of Piarowski's three works had fragmented the exhibit. (Tr. 127-132). On the following day, respondents also received a petition signed by over 100 PSC students, objecting to PSC's censorship of Piarowski's works. (Tr. 792-793, Pl. Ex. 8C).

Piarowski met with PSC President Creal on March 20, 1980. Creal refused to permit restoration of the stained glass works to display in the gallery. (Tr. 137-139). Creal subsequently wrote that the pieces were ordered moved because some viewers considered them offensive. Creal stated that it was the responsibility of the Art Department to review artworks in terms of acceptability, but in so doing they should give consideration to "the prevailing standards of the local community." (Tr. 812-817, Pl. Ex. 7). Further, the judgment of the Department could be "overridden if the Board or Administration felt that the displays were not in the best interests of the college." (*Id.*) At trial Creal testified that the major criteria for

the decision were that the works were offensive to women and blacks and that the display of the works would be detrimental. (Tr. 786-787; 806).[7] The actions taken by Creal and Andrews were subsequently ratified at a meeting of the PSC Board of Trustees. (Tr. 667-668).

This action was brought under the First and Fourteenth Amendments, 42 U S.C. §§ 1983 and 1988, 28 U.S.C. § 2201 et seq., seeking declaratory and injunctive relief and damages. The District Court had jurisdiction of this case, pursuant to 28 U.S.C. §§ 1331 and 1343.

The district court entered judgment for the respondents, holding that the PSC gallery was a non-public forum from which officials of the college could remove Piarowski's artworks to advance the "best interests" of the institution. App. at 2a.

Piarowski appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed the judgment of the district court, holding that PSC and its officials had not violated the First Amendment by removing the artworks from the art gallery, on the complaint of persons offended by the works, and by offering as an alternative site for the display of his art, a smaller, remote

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[7] In addition, PSC President Creal testified at trial that, to his knowledge, neither he nor any other member of the PSC administration had ever presented to the Board of Trustees any proposal to codify in writing regulations or standards to dictate what types of works could be hung in a gallery at Prairie State College. (Tr. 847-848). Although respondents' answer to the complaint (¶¶ 7, 10) offered as justification for removal of the artworks an alleged college policy of insuring works exhibited on the PSC campus were in good taste and reflected the morals and tastes of the community, no PSC witness was able to testify that such a policy existed. (Andrews, *supra*, Tr. 937-948; Creal, Tr. 835; Simms, Tr. 725; Martin, Tr. 675). Dr. Heller testified that artists exhibiting under such a standard would "necessarily be cast into doubt and be confused or anxious about the fate of their artwork." (Tr. 506).

photography gallery, which was fully occupied with exhibits for the foreseeable future. *Piarowski v. Prairie State College,* 759 F.2d 625 (7th Cir. 1985). App. at 18a. Piarowski filed a petition for rehearing, with a suggestion for rehearing *en banc,* which was denied without opinion on May 10, 1985. (App. at 31a).

Petitioner requests that a writ of certiorari be issued to the United States Court of Appeals for the Seventh Circuit, so that this Court may review its decision.

## REASONS FOR GRANTING THE WRIT

### I. THIS CASE INVOLVES FIRST AMENDMENT QUESTIONS OF EXCEPTIONAL IMPORTANCE

This is a case in which a public community college has suppressed protected expression by engaging in the *ad hoc* standardless censorship of artworks displayed in a faculty art exhibit in the college gallery. There is no dispute that the stained glass works removed from the gallery are protected expression. *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61 (1981).[8]

With good reason, this Court has frequently referred to the college and university environment as the "marketplace of ideas." *Healy v. James,* 408 U.S. 169, 180 (1972). Unlike elementary and secondary schools, institutions of higher education are expected to be places of free wheeling inquiry, vigorous dispute, and discussion. Yet in this case the respondent college officials have candidly acknowledged that the reason for the abrupt removal of Piarowski's art from the college gallery was

[8] Dr. Heller, an expert curator and art educator, specifically testified that the works had serious artistic value, (Tr. 444-454); the District Court concluded that the works had artistic value, (App. at 9a); and the Court of Appeals came to the same conclusion. *Piarowski v. Prairie State College,* 759 F.2d at 627, App. at 20a.

that the college had received complaints that the works were often offensive to women and blacks. (Tr. 806). The District Court recognized that the college had removed the art from the gallery because of complaints from offended viewers and held that PSC's desire to protect its public image was a sufficient justification for the censorship which occurred. (App. at 11a). Finally the Court of Appeals forthrightly recognized the same motivation for the censorship and stated "Not every trivial alteration of the site of an art exhibit—not every modest yielding to public feeling about sexually explicit and racially insulting art—is an abridgement of freedom of expression." *Piarowski*, 759 F.2d at 632, App. at 29-30a.

In this case the United States Court of Appeals has upheld standardless suppression of admittedly protected expression. It is therefore a case which "directly and sharply" implicates faculty First Amendment rights in the context of a public community college. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). By this decision the Court of Appeals has sharply constricted the right of faculty to exhibit artworks in accordance with accepted academic tradition. Moreover, the decision is a license for future suppression of any form of protected expression which college authorities determine, on an *ad hoc* basis, to present offense to some group or a threat to the public image of the college. As stated by Dr. Heller, such practices induce doubt and confusion in an educational system. (Tr. 505-506).

The Court of Appeals should have considered and followed compelling authority of this Court which would have required a contrary decision in this case. The Court of Appeals failed to give appropriate consideration to this Court's teachings that neither the alleged "offensiveness" of protected speech nor the reaction of a hostile audience may be used as a justification for censorship. The appellate court failed also to heed this Court's decisions which explicitly prohibit government regu-

lation of speech which suppresses one viewpoint and favors others, and misapplied this Court's decision in *Perry Education Assn. v. Perry Local Educators Assn.*, 460 U.S. 37 (1983), with respect to analysis of the PSC art gallery as a forum, regulation on the basis of content, and the conditions under which expression can be diverted to an alternative forum.

This case presents an opportunity for this Court to review continuing restrictions on protected expression. Unless the decision of the Seventh Circuit is reversed by this Court, it will continue to exert its chilling effect.

## II. THE COURT OF APPEALS ERRED IN APPROVING CENSORSHIP AND VIEWPOINT SUPRESSION

### A. Offensiveness

The fact that expression is offensive to some segment of a community cannot be the basis for restraining otherwise legal First Amendment activity. This Court has steadfastly refused to permit hostile audiences, public intolerance, or animosity to justify suppression of protected speech. *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Cohen v. California*, 403 U.S. 15 (1971).

*Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), was a case challenging the federal statute prohibiting the unsolicited mailing of contraceptive advertisements. Even in the case of materials mailed to the home, this Court characterized the interest of the government in shielding recipients from offensive materials as carrying little weight. 463 U.S. at 71. Quoting from *Carey v. Population Services International*, 431 U.S. 678, 701 (1977), this Court stated again in *Bolger* that "At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." 463 U.S. at 71. Similarly, in *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 910

(1982), the Court stated that "Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action."

Piarowski testified that his choices of subject matter and color of the stained glass works were based on aesthetic considerations. (Tr. 115-117, 159, 227-228). The Court of Appeals found that Piarowski did not intend his art works as a disparagement of women or blacks. *Piarowski*, 759 F.2d at 628, App. at 22a. The characterization of the works as insulting to blacks and women is drawn entirely from subjective perceptions of persons in the college community who were opposed to continued display of the works.[9] The college's yielding to community hostility to suppress protected expression thus unconstitutionally established a heckler's veto. *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Street v. New York*, 394 U.S. 576 (1969); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

Protected expression cannot be held to subjective standards of good taste or non-offensiveness, and the Court of Appeals erred in accepting offense to viewers as a basis for suppression of speech. *Cohen v. California*, 403 U.S. at 21-26; *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

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[9] Prairie State College services an adult population. (Tr. 598-599; 926, 932). Although some blacks and women appeared to be highly sensitive to display of the works, the artworks are entirely suitable for exhibition to adults. *Bolger v. Youngs Drugs*, 463 U.S. at 73-74; *Butler v. Michigan*, 352 U.S. 380, 383 (1957). *See also Lebron v. Washington Metro Area Transit Auth.*, 749 F.2d 893, 897, n. 8 (D.C. Cir. 1984) (speakers not required to indulge the lowest common denominator of the populace).

The only black Vice-President of PSC found no racial message in the works (Tr. 708-709) and many of the students who protested the censorship were women. (Tr. 792-795, Pl. Ex. 8A). Finally, Dr. Heller testified that works with similar subject matter are on unrestricted display in public galleries and educational institutions in Chicago and elsewhere. (Tr. 425-433, Pl. Ex. 20A-I).

**B. Suppression of Ideas**

In *Police Dept. of City of Chicago v. Mosley,* 408 U.S. 92, 95-96 (1972), this Court condemned government censorship of thought and held that " . . . above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." This prohibition against censorship must be the starting point for analysis of PSC's treatment of Piarowski's artistic expression.[10] Using the slippery standards of public image and offensiveness, PSC has divided artistic expression into two categories: an approved category of speech which does not offend women or blacks and which serves the public image of the college; and that expression which deviates from the approved viewpoint and is therefore subject to suppression. This action, official suppression of a class of disapproved expression, offends the principle of viewpoint neutrality.

Following *Mosley,* this Court has consistently held that viewpoint-based discrimination, tied to the content of communication as here, is a plain violation of the First Amendment. *Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. at 46, 49; *Members of City Council v. Taxpayers For Vincent,* ____ U.S. ____, 104 S.Ct. 2118, 2128 (1984); *Cornelius v. N.A.A.C.P. Legal Defense and Educational Fund, Inc.,* ____ U.S. ____, 105 S.Ct. 3439, 3451 (1985). In *Members of City Council v. Taxpayers For Vincent,* the Court characterized as "plainly illegitimate" a government desire "to exclude the expression of certain points of view from the marketplace of ideas." 104 S.Ct. at 2128. *See also, Cinevision Corp. v. City of*

[10] This is not a case which simply turns on the sexually explicit subject matter of the art, for such art previously had been exhibited in the gallery. (Tr. 85-89, Pl. Ex. 14). As the district and appellate courts noted, the concern was not merely that these particular works were sexually explicit but that they were perceived as offensive to women and blacks.

*Burbank*, 745 F.2d 560, 573 (9th Cir. 1984) (particular type of music, "hard rock," unacceptable to City).

In *Board of Education, Island Trees v. Pico*, 457 U.S. 853 (1982), this Court considered the removal of books from high school and junior high school libraries by school officials. In that case this Court held that, even in secondary schools, an official motivation to deny access to the ideas contained in the books would violate the First Amendment. 457 U.S. at 871. The *Pico* decision again condemned official suppression of ideas as a means to establish orthodoxy in the classroom. *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

It would be hard to find a more graphic example of suppression of ideas than that which has been accomplished by the college officials in this case. Here, the Court is not asked to review regulation of speech which has occurred through consistent application of established policies, procedures, or regulations. PSC's *ad hoc* censorship of Piarowski's artworks was not accomplished by any fixed, objectively ascertainable system. As in *Pico*, the artworks were not removed pursuant to any established review procedure. 457 U.S. at 874. Here, in fact, the removal was in contravention of established academic tradition. PSC officials were willing to remove art from display on the basis of complaints, giving exclusive weight to the subjective interpretations of a hostile audience that the works were offensive to blacks and women.[11]

The Court of Appeals accepted PSC's alleged need to "protect its image" as an appropriate justification for removing Piarowski's art from the college gallery. *Piarowski*, 759 F.2d at

[11] The record documents that neither respondents Creal nor Andrews, officers of PSC, took any notice of the 1980 faculty exhibit. It had been installed for 10 days without their notice until complaints began to filter in. (Tr. 777; 791-794).

630, App. at 24a. One searches the decisions of this Court in vain for any decision permitting suppression of protected expression in a college level institution, for the purpose of protecting the institution's public image. Like many other vague and amorphous standards this Court has previously condemned, the need to protect a public image is grossly deficient as a standard for regulating protected expression. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150 (1969) (public welfare, decency, good order, morals, convenience). Approval of a "public image" standard to regulate expression would permit unlimited suppression of any viewpoint at variance with those favored by college administrators. Far more than artistic expression would fall prey to a reserved discretion to regulate speech to protect the institution's public image. For example, if offense to women and blacks is one form of image-tarnishing speech, could a department of the college host a speaker who took positions perceived as being against affirmative action or comparable worth? Could such a speaker be barred from the symposium in the main floor auditorium and "relocated" to a fourth floor meeting room in the political science department once the speaker's views were known (or misunderstood)?

Moreover, in *Papish v. Board of Curators of University of Missouri,* 410 U.S. 667, 669-70 (1973), this Court rejected the position that freedom of expression on a university campus could be subordinated to other university interests, namely the conventions of decency. In *Papish* a graduate student had distributed on campus a newspaper containing a political cartoon and text which the university characterized as indecent, at a time when prospective students and their parents were visiting the campus. PSC's desire to avoid temporary embarrassment as a result of permitting the faculty art exhibit to run its course is less compelling than the university interest rejected in *Papish.*

The Court of Appeals held that it was necessary for the college to have the right to "relocate" Piarowski's works in order to ". . . correct the curator's errors of taste." *Piarowski*, 759 F.2d at 631-32, App. at 28a. In reaching this conclusion the Court reached beyond the record of this case to consider the alleged management needs of public and private museums. *Id.*[12]

As with the need to protect the college's image, deference to an alleged need to correct errors of taste is no more than the reservation of an absolute discretion to engage in official suppression of protected expression. This is particularly true when the "errors of taste" are identified by persons objecting to the messages allegedly communicated by the artworks. Purging errors of taste is in fact suppressing ideas distasteful to some segment of the college community. *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. at 46. *Cohen v. California*, 403 U.S. at 25-26.

Closely allied to PSC's asserted need to protect its public image was its view that permitting the artworks to remain on exhibit in the gallery would amount to PSC endorsement of the content of the works. The Court of Appeals accepted this premise:

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[12] The Court of Appeals' concern for dire effects upon public museums if defendants are held to have acted wrongly is confusing. The Court itself notes that museums are not similar to the forum in issue (759 F.2d at 631) and academic freedom is generally not an issue in the public museum setting. In this case the exhibition was in conformity with the established academic traditions of art faculty displaying their most recent works. (Tr. 76-77). This case has nothing to do with acquisition or display of a permanent art collection at PSC or with decoration of the premises generally. Further, the distinguished public galleries noted in the Court of Appeals opinion may have prudently retained curators pursuant to written employment contracts or job descriptions with a review process to settle artistic differences. App. at 28a.

> The college authorities did not have to ignore the controversy created by Piarowski's windows. If the college had done nothing it might have been thought to be endorsing the windows by allowing them to be displayed so prominently right off the main thoroughfare, [the mall] and near the main entrance, of the college. 759 F.2d at 631, App. at 27a.

In reaching this conclusion the Court of Appeals disregarded contrary authority of this Court. The First Amendment requires colleges and their administrators to tolerate much expression which they would not endorse. In *Healy v. James,* 408 U.S. at 188, this Court held that a state college could be required to grant official recognition to student groups with which the administration had profound disagreements. In *Widmar v. Vincent,* 454 U.S. 263, 276 (1981), in the context of the establishment clause, this Court stated that "an open forum in a public university does not confer any imprimatur or State approval" on the views expressed. *Id.* at 276, n. 14. The Court found that students, as young adults, should be able to appreciate that the university's policy was one of neutrality. Similarly, in *Lynch v. Donnelly,* ____ U.S. ____, 104 S.Ct. 1355, 1369 (1984), Justice O'Connor's concurrence stated the principle equally applicable to the display of art in a gallery: "... [A] typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." Finally, Dr. Heller's expert testimony establishes that, under academic tradition, the endorsement of artworks by the exhibiting institution would not be presumed. (Tr. 477-480).[13]

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[13] Unlike the Seventh Circuit, other Courts of Appeals have not permitted censorship of expression upon a presumption of official endorsement. *See Gay Student Services v. Texas A. & M. University,* 737 F.2d 1317, 1327 (5th Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1860 (1985); *Bazaar v. Fortune,* 476 F.2d 570 (5th Cir. 1973), *modified en banc,* 489 F.2d 225 (5th Cir. 1974); *Schiff v. Williams,* 519 F.2d 257, 259-60 (5th Cir. 1975); *Jaffe v. Alexis,* 659 F.2d 1018, 1022 (9th Cir. 1980).

The Court of Appeals also relied incorrectly upon Piarowski's position as chairman of the art department to justify PSC's censorship of his works, stating that his position, if known, "would enhance the impression of official approval." *Piarowski,* 759 F.2d at 631, App. at 27a. Quite apart from legal authorities which reject a presumption of endorsement, the record negates any conclusion that Piarowski's position as department chairman enhanced an appearance of PSC approval of his artworks. The President of PSC acknowledged that the faculty exhibit was a display of the artists' personal works. (Tr. 908-910, 926). The record is clear also that Piarowski was participating in the faculty exhibit in his capacity as a full-time member of the art faculty. The advertising piece which announced the exhibition listed the four participating faculty members, in alphabetical order, without titles, by name and artistic medium. (Tr. 91). Each exhibiting artist chose his or her own works for display, pursuant to the invitational method of exhibition. Thus, Piarowski's administrative position gave his works neither greater nor lesser status within the forum. Whether as department chairman or faculty member, each artist exhibited works selected under the dictates of his or her own artistic integrity. (Tr. 77). Therefore, it was error for the Court of Appeals to rely upon Piarowski's duties as administrator to approve censorship of his work as artist. (Tr. 76-77).[14]

PSC's concerns with its public image and its desire to avoid the appearance of having endorsed Piarowski's works could easily have been addressed by posting an appropriate dis-

[14] In any event, neither PSC nor the Court of Appeals appears to seriously suggest that if the censored works had been the work of another faculty artist, they would have been permitted to remain. Even if the Court of Appeals focused upon Piarowski's position as chairman, the persons complaining had focused upon the purported content of the works, and suppression of that content is the conceded reason for their removal from the gallery. (Tr. 806).

claimer in or near the gallery. The college could have informed the public that PSC did not endorse the content of any art in the exhibit, and that the faculty's rights of freedom of expression and academic freedom prevented the college from censoring their works. The decisions of this Court establish that the use of a disclaimer can cure an appearance of endorsement, and disclaimers must be preferred to bans on expression. *F.C.C. v. League of Women Voters,* ____ U.S. ____, S.Ct. 3106, 3125-26 (1984); *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 87 (1980). *See also Bazaar v. Fortune,* 489 F.2d 225 (5th Cir. 1974); *Jaffe v. Alexis,* 659 F.2d 1018, 1022 (9th Cir. 1980); *U.S. Southwest Africa/Namibia Trade and Cultural Council v. United States,* 708 F.2d 760, 772 (D.C. Cir. 1983).[15]

The record of this case demonstrates that PSC suppressed protected expression, on the plainly impermissible grounds of appeasing complainants who perceived the artworks as offensive to women and blacks. Preservation of the college's public image does not state a compelling governmental interest; *ad hoc* censorship is not narrowly drawn regulation. *Widmar v. Vincent,* 454 U.S. 269-270; *Carey v. Brown,* 447 U.S. 455, 460-63 (1980).

## III. THE PUBLIC FORUM ISSUE

### A. The Nature of the Forum

In the Courts below Petitioner argued that the Prairie State College art gallery was a limited public forum of the type identified in *Perry Education Assn. v. Perry Local Educators'*

[15] The opinion of the Court of Appeals also incorrectly placed upon Piarowski the burden of suggesting a disclaimer of college sponsorship of his own work. *Piarowski,* 759 F.2d at 632. The burden of making a disclaimer falls upon the entity wishing to disassociate itself from another's expression. *Pruneyard Shopping Center v. Robins,* 447 U.S. at 87; *F.C.C. v. League of Women Voters,* ____ U.S. ____, 104 S.Ct. at 3125-26.

*Assn.*, 460 U.S. at 45-46. At trial, Piarowski demonstrated that the gallery was designed for and dedicated to expressive activities. (Tr. 46-60; 781-784). *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 555 (1975). The record shows also that the art faculty were among those intended to use the gallery for purposes of expression and that the faculty art exhibit was installed in the gallery pursuant to established PSC and academic practice. (Tr. 74-79; 467-473).

Nevertheless, the Court of Appeals held that the gallery was not a public forum. The Court focused upon the rights of the general public to exhibit in the gallery, and rejected a claim which was never asserted by Piarowski, that of general access to his employer's property as a forum. *Piarowski,* 759 F.2d at 629-630, App. at 22-23a. In its concern with the rights of the general public, the Court of Appeals failed to carefully apply this Court's *Perry* decision to the actual circumstances of this case. Further, the Court of Appeals gave no consideration to the fact that there was no question of access to the PSC gallery. Rather, the case turns upon summary eviction of artworks properly present in the gallery, to prevent people from viewing them.

This Court's *Perry* decision plainly dispels any notion that creation of a limited public forum requires the grant of a general right of access to the public. In *Perry,* the Court stated:

> A public forum may be created for a limited purpose such as use by certain groups, *e.g., Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (student groups), or for the discussion of certain subjects, *e.g., City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n.,* 429 U.S. 167, 97 S.Ct. 421, 50 L.E.2d 376 (1976) (school board business).

*Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. at 46, n. 7; *Cornelius v. N.A.A.C.P. Legal Defense And Educational Fund, Inc.,* ____ U.S. ____, 105 S.Ct. at 3449-50.

The record establishes the art faculty as one group whose expression the gallery was intended to accommodate. Respondent Creal, the institution's president, expressly stated that the gallery was intended to be used

> . . . by a variety of groups within the college to display all kinds of exhibits. It may or may not be related to classroom activities or it may just be a demonstration by either invited artists or outside individuals or outside groups, or inside groups, student, faculty, whatever. (Tr. 851).

This case has never involved exhibition of artworks anywhere on the PSC campus except the main floor art gallery. As in *Cornelius v. N.A.A.C.P. Legal Defense and Educational Fund,* the relevant forum to be considered is "the particular channel of communication," the main floor gallery, not the entire PSC campus. ____, U.S. ____, 105 S.Ct. at 3448.[16] As this Court explained in *Cornelius:*

> When speakers seek general access to public property, the forum encompasses that property. See, *e.g., Greer v. Spock, supra.* [424 U.S. 828, (1976)] In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.
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> ____ U.S. ____, 105 S.Ct., at 3448-49.

Under the criteria specified and applied by this Court, the PSC art gallery is an ideal example of a limited public forum. It has been designed for and dedicated to expressive activity, the display of artworks. Prairie State had established a procedure for displaying a variety of temporary and changing exhibits. Not only was the exhibition of artworks compatible with the purpose and functioning of the gallery; display of art was the

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[16] As set out more fully below, the offer of the fourth floor photography gallery was not the offer of a legally sufficient alternative forum. The Court of Appeals' conclusion that the main floor gallery, the fourth floor photography gallery, and unspecified other rooms constituted a single public forum is erroneous. *Piarowski,* 759 F.2d at 630, App. at 24-25a.

principal function of the gallery, a topic specifically encompassed within the purpose of the forum. Finally, as a fulltime member of the PSC art faculty, Piarowski was "a member of the class of speakers for whose especial benefit the forum was created . . ." *Cornelius v. N.A.A.C.P. Legal Defense Fund,* ____ U.S. ____, 105 S.Ct. at 3451.

The record in this case contains abundant evidence of PSC's suppression of artistic expression because of its alleged offense to women and blacks. In a limited forum, government may not regulate on the basis of content absent compelling justification. *Perry,* 460 U.S. at 46. As shown above, none of the professed reasons asserted by respondents are sufficiently compelling. However, even if the Court of Appeals had correctly classified the gallery as a nonpublic forum, here, defendants had an impermissible motive for removal of protected expression. This Court stated in *Perry* and most recently in *Cornelius* that even in a nonpublic forum, . . . "the Government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. N.A.A.C.P. Legal Defense Fund,* ____ U.S. ____, 105 S.Ct. at 3451. *Perry Education Assn v. Perry Local Educators' Assn.,* 460 U.S. at 46.

### B. There Was No Adequate Alternative Forum

The Court of Appeals also departed from established First Amendment law in holding that PSC' censorship of Piarowski's works was justified because " . . . good alternative sites *may* have been available to him . . ." *Piarowski,* 759 F.2d at 632, App. at 30a. (Emphasis added.) This conclusion is based upon mere speculation. There is no factual support for the Court of Appeals' determination even that an adequate alternative display area *may* have been available.[17] More importantly,

[17] Thus record offers no support for the Court's speculation concerning alternative sites. *Piarowski,* 759 F.2d at 632, App. at 30a.

*Footnote continued on following page.*

Piarowski had no legal duty to remove his works or the entire exhibit to another site based on such speculation.

The principle which should have guided the Court of Appeals' consideration of even the possibility of an adequate alternative forum was stated by this Court in 1939:

> One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place. *Schneider v. State*, 308 U.S. 147, 163 (1939).

*Southeastern Promotions Ltd. v. Conrad*, 420 U.S. at 556; *Schad v. Borough of Mount Ephraim*, 452 U.S. at 77.

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*Footnote continued from preceding page.*

Evidence at trial established the existence of two spaces used for exhibition of art: the main gallery (Tr. 73-75) and the smaller photography gallery on the fourth floor (Tr. 150-151). It was pure conjecture for the Court to suggest that Piarowski knew of, but failed to recommend non-existent alternative sites. 759 F.2d at 632, App. at 28-29a.

The Court of Appeals appeared to rely heavily upon its view that the college administration may not have known that the fourth floor photography gallery was booked with other exhibits at the time Andrews suggested it as an alternative site. 759 F.2d at 628, 632, App. at 21a, 28-29a. Again, this is speculation not supported by the record. A schedule of exhibits in the photography gallery had been distributed (Tr. 151-153), and the college's press officer had written press releases concerning these scheduled exhibits. (Tr. 554-558). The same press officer participated in discussions and made recommendations concerning removal of Piarowski's works from the main floor gallery. (Tr. 300-317; App. 6a-7a). Finally, the record includes Piarowski's testimony of his statement to Andrews that the fourth floor gallery would be "totally unsuitable." (Tr. 153).

Similarly, there is no support in the record for the Court of Appeals' speculation that the smaller photography gallery would have been large enough to hold "... all of Piarowski's windows and indeed the whole exhibit." 759 F.2d at 628, App. at 21a. The entire 1980 faculty exhibit consisted of 25 pieces, contributed by four artists. (Tr. 207). The record at most is unclear as to whether there would have been proper exhibition space on the fourth floor even for all eight of Piarowski's works. (Tr. 965-967).

In this case the Court of Appeals has approved removal of art from the one place most fitting for its display to a place the college itself characterized as less visible and less accessible. (Tr. 311-313; 903).[18] The conclusions of the Court of Appeals must be rejected because at bottom the suggested relocation of the artworks was occasioned by impermissible motives. The works were to be removed from the gallery because a hostile audience objected to their display there, and the college designated the fourth floor site to accommodate this hostile audience.

Relying on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the Court of Appeals concluded that Piarowski's artistic expression was regulated rather than suppressed. *Piarowski*, 759 F.2d at 630, 632, App. at 24a, 30a.

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[18] The Court of Appeals opinion distinguished *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970), a case which upheld a state university's removal of sexually explicit paintings from a corridor display. *Close* is not of material assistance in this case because of substantial factual and legal differences. The site of the exhibit in *Close* was a corridor or passageway. 424 F.2d at 990. The record here establishes that the PSC gallery is a separate room, an alcove adjoining a large open mall. While the Court of Appeals opinion characterized the PSC gallery as "a gallery that is missing an outside wall," 759 F.2d at 630, App. at 26a, and as "what amounts to the busiest corridor in a college," *Id.* at 632, App, at 30a, the PSC mall and gallery are extremely spacious and not at all the equivalent of the passageway wall in *Close*. *See also Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (outdoor theater, nudity).

More important, *Close* was decided in 1970, and that Court did not have the benefit of this Court's subsequent holdings which forbade public officials to use offensiveness as a justification for censorship of protected speech. *Cohen v. California*, 403 U.S. 15; *Organization For A Better Austin v. Keefe*, 402 U.S. 415; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60. Significantly, in this case where offensiveness of protected expression is a critical factor, the Court of Appeals apparently did not consider the applicability of *Cohen, O.B.A. v. Keefe*, or *Bolger v. Youngs Drug*.

While *Young* involved locational restrictions on adult motion picture theaters, the regulation of speech at issue in *Young* occurred as a result of formally enacted ordinances of prospective application. 427 U.S. at 52, 71, n. 35. The ordinances in *Young* were not enacted to excise a perceived viewpoint and were not an *ad hoc* scheme to commission roving censors. 427 U.S. at 70. If a theater satisfied locational restrictions and exhibited protected expression, complaints from the neighbors could not restrict that protected expression. Piarowski's art was in the appropriate location and was protected expression. It was removed solely to suppress its perceived insult to women and blacks.

Unlike the regulation upheld in *Young*, PSC's proposal to move Piarowski's expression from the main floor gallery to the fourth floor photography gallery had no objective support. In the face of strong academic and gallery tradition against fragmentation of exhibits, and destruction of the artistic theme and value of a faculty exhibit, *Cf. Piarowski*, 759 F.2d at 631, App. 27a, college officials summarily lifted the three offending pieces from display and offered an already occupied remote gallery as substitute exhibition space. (Tr. 465-474, 124-126, 132-134, 153). What occurred here was not a "... trivial alteration of the site of an art exhibit ..." 759 F.2d at 632, App. at 29a; and it was not regulation of location. In *Young* this Court held that the case would have been "quite different" if the ordinance, as here, resulted in "greatly restricting access to lawful speech." 427 U.S. at 71, N. 35. And, as Justice Powell aptly stated in his concurring opinion, "... this situation is not analogous to cases involving expression in public forums or to those involving individual expression...." 427 U.S. at 76.

The offer of alternative exhibition space in this case did not cure the constitutional violation caused by removal of the artworks from the gallery. The fourth floor space was smaller, remote, already occupied, and removal to that site would have

fragmented the exhibit. Removal to the fourth floor gallery would have had the effect of greatly restricting access to the three items of protected expression. Exhibition of the artworks in the first floor gallery was a reservation of that forum for its intended purpose; the offer of an alternative solely to suppress the expression violates the First Amendment. *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. at 46.

## IV. ACADEMIC FREEDOM

By censoring Piarowski's artworks for improper motives, PSC has also violated the right of academic freedom of Piarowski and his art department colleagues.[19] While scholars in other disciplines publish in academic journals, the creating artist develops his techniques and ideas through the production of new artworks. In this case Piarowski testified that he found inspiration for new works in the drawings of Beardsley. (Tr. 117). Dr. Heller testified that faculty exhibitions of such new work, presented through use of the invitational method, are standard practice. (Tr. 467, 473-474).

This Court has recognized that "Academic freedom, though not a specifically enumerated constitutional right, long

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[19] PSC employment contracts include a provision granting academic freedom:

> *Section 4.1. Academic Freedom.* Each member of the faculty is a member of a learned profession and an officer of an educational institution. When he speaks or writes, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence, he should at all times be accurate, should show respect for the opinion of others, and should make every effort to indicate that he is not an institutional spokesman. The Board recognizes its responsibility to protect and encourage the search for truth and its dissemination, as each member of the faculty must recognize his obligations in these matters.
>
> (Tr. 886)

has been viewed as a special concern of the First Amendment." *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978). "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; . . . " *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). This Court has totally rejected the notion that government officials can prescribe what shall be orthodox in matters of opinion, at every level of the educational system. *Keyishian v. Board of Regents*, 385 U.S. 598, 603 (1967) (university); *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (public schools); *Board of Education, Island Trees v. Pico*, 457 U.S. at 870 (junior and senior high schools).

The Court of Appeals held that Piarowski's right of academic freedom could be subordinated to the same standardless suppression which swept his three works out of the gallery. *Piarowski*, 759 F.2d at 629-630, App. at 23-24a. The Court of Appeals held that there had been no violation of the right of academic freedom because PSC needed to be able to manage its affairs as it chose, including censorship of allegedly offensive art, to protect its public image. *Id.* at 630, App. at 24a.

The form of censorship approved by the Court of Appeals is particularly destructive to academic freedom. It will require not only artists, but all scholars, to avoid the publication of ideas which may not promote the public image of PSC. In these circumstances artists and writers must be careful not only to avoid offense to PSC and its officers, but to unknown critics applying unknowable standards.

Regulation of protected expression, to produce art and scholarship to promote PSC's public image, is totally at odds with the First Amendment. Uncertainty as to what protected expression may be proscribed by unarticulated standards will produce caution and self-censorship in PSC faculty artists. *Keyishian v. Board of Regents*, 385 U.S. at 601. Such restraints on speech fail to provide the necessary breathing space to

freedom of expression. *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963); *New York Times v. Sullivan*, 376 U.S. 254, 271-272 (1964).

In this case there has been suppression of protected expression in violation of the First Amendment. The standard for suppression approved by the Court of Appeals will insure the future imposition of "ideological discipline." *Board of Education, Island Trees v. Pico*, 457 U.S. at 877 (Blackmun, J.), citing *West Virginia Board of Education v. Barnette*, 319 U.S. at 637.

## V. PROCEDURAL SAFEGUARDS

An unlawful restraint on an individual's freedom of expression "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). In *Southeastern Promotions v. Conrad*, 420 U.S. 546, 560 this Court defined adequate procedural safeguards: "*First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured."

When PSC and its officers determined to censor protected expression in the college art gallery, their actions had the effect of establishing a prior restraint for the remaining period of the exhibit. Like the municipal theater in *Southeastern*, the PSC gallery was designed for and dedicated to expressive activities, was capable of accommodating the proposed expression, and was not serving a competing use. 420 U.S. at 556. Therefore, denial of the use of the gallery forum for the balance of the exhibit obligated PSC to institute judicial proceedings to determine whether its censorship of protected expression was constitutional. Because the artworks were censored upon the subjective and ill-defined bases of community hostility and

public image, it was particularly incumbent upon PSC to provide the procedural safeguards mandated by *Southeastern*. As demonstrated above, there was a total absence of "established, regular, and facially unbiased procedures" which authorized or guided the respondents' actions. *See, Board of Education, Island Trees v. Pico*, 457 U.S. at 874.

The Court of Appeals also should have found a violation of Piarowski's First Amendment rights in PSC's failure to provide adequate procedural safeguards before suppressing his protected expression.

## CONCLUSION

The present case raises substantial First Amendment questions concerning the right of a public community college to suppress admittedly protected artistic expression. The decision of the United States Court of Appeals has accepted restrictions on speech which have no support in and are in conflict with the decisions of this Court. Therefore, the decision of the United States Court of Appeals for the Seventh Circuit should be reviewed upon a writ of certiorari and should be reversed.

Respectfully submitted,

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# APPENDIX

A. The decision of the United States District Court for the Northern District of Illinois. (December 29, 1983) ..... 2a

B. The decision of the United States Court of Appeals for the Seventh Circuit. (April 12, 1985) ..... 18a

C. The order of the United States Court of Appeals for the Seventh Circuit denying rehearing *en banc*. (May 10, 1985) ..... 31a

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

ALBERT R. PIAROWSKI,
*Plaintiff,*

*v.*

ILLINOIS COMMUNITY COLLEGE DISTRICT 505, et al.,
*Defendants.*

No. 80 C 5309

## MEMORANDUM OPINION AND ORDER

The question presented by this case is whether the "Right to Freedom of Expression" is violated when the administration of an Illinois community college has taken down the "works" of one of its art teachers which were on display in a faculty exhibit in the college's exhibition center adjacent to the enclosed mall of its main building, because it determined that the teacher's "works" were vulgarly degrading to Negro women and embarrassing to the college. One of the works depicted from the rear what would easily be presumed to be a nude Negro woman engaged in self sexual stimulation. Another depicted from her rear what would easily be presumed to be a nude Negro woman kneeling and worshipfully engaging in an embrace of a symbolically massive phallus of a white man.

The suit was brought under the appropriate statutes by the teacher, himself the head of the Art Department, against the College generally and specifically against the President and Vice-President of the College, demanding declaratory and injunctive relief under the First Amendment and money damages under 42 U.S.C. 1983, et seq. This was, he claimed, state action violating "his" right to freedom of speech.

The case was tried before the court without a jury, and submitted for decision on transcripts of testimony, exhibits received in evidence and certain pleadings and discovery documents filed with the clerk. It was understood by the parties that all evidence used and argued by the parties, and all evidence referred to by the court in its decision on the facts was properly admitted during the course of the trial.

The parties, of course, disagree as to what some of the facts in evidence show, and disagree as to the principles of law to be applied to the case. I rule for the defendants on all issues; the purpose of this extensive memorandum being to explain the reasons for my ruling. The court at the outset commends counsel for both sides for their excellent and professional handling of the case and briefs, and in particular the legal staff of the American Civil Liberties Union for its especially commendable performance for the plaintiff and its splendid organization of the exhibits to be reviewed by me.

Prairie State College ("Prairie State") is a two-year community college located in Chicago Heights, Illinois, a suburban village southwest of Chicago. Its school district includes several communities surrounding the school all of which are both racially and socio-economically diverse. Chartered under the Public Community College Act, Ill. Rev. Stat. ch. 122, §§ 101-108 (1981), Prairie State is mandated to provide the communities it serves with quality education at low cost. It has six thousand students. It offers general and special studies to prepare its students for transfer as upper classmen to four-year colleges or universities, or to give them career vocational training and to furnish general community education programs. To a large extent Prairie State depends on its local communities for financial support through real property taxes imposed on properties located within the school district. *Id.* at § 103-14, -20, -20.5. Over the years Prairie State has enjoyed steady growth and prosperity, symbolized most recently by the completion in 1975 of a new "main" building.

Albert R. Piarowski has been chairman of the Prairie State art department since the days when the school was known as Bloom Community College. As a witness, he stated that the art department faculty regularly held both student and faculty exhibits on campus and that he had never been told by his superiors that his discretion in choosing art work for exhibits would be subject to review. He did testify, however, to two incidents in which school administrators objected to certain art displays. In 1974, the then vice-president for instructional services, a Dr. Andrews, asked Piarowski to remove from a bulletin board on the main floor a student's charcoal sketch of a nude figure. Of his own volition, Piarowski placed it in a special gallery with the remainder of the student exhibit. On another occasion two years later, Dr. Andrews informed Piarowski that an administrative assistant had objected to a photographic composition designed by Piarowski because it contained nudity that "bordered on hard pornography." Piarowski was indignant; but no action was taken with respect to this complaint.

The faculty exhibition in which was located the subject pieces of art relating to this litigation was scheduled to begin on March 3, 1980 and to continue for three weeks thereafter. It was to be held in an open gallery on the first floor of the main building. The first or "main" floor features a "mall" or multi-purpose area which is surrounded by some classrooms, but which is principally used up with administrative offices, two cafeterias, a library, lounge areas and rooms devoted to student activities and student government, and of course the gallery. The gallery is "alcoved" off the mall next to the main entrance and near the cashier's office. Although there is some disagreement as to whether or not it was originally established as an exclusive art gallery, the evidence shows that the art department has used it repeatedly for scheduled displays of the works of its students and faculty.

In this exhibition the four full-time members of Prairie State's art faculty had planned to show their own most recent

works. Notices of it were placed by the school's public relations specialist in the local press, posters advertising it were placed throughout the school, and flyers were distributed locally seeking to attract to the college people from nearby public and private schools and colleges and representatives of the community at large. The advertisements announced that art faculty works of photography, painting, drawing, and stained glass would be on display.

Piarowski's contribution to the exhibit was eight stained glass windows. While five were abstracts in design, three of them were inspired by the drawings of Aubrey Beardsley, a 19th century English artist. Beardsley's drawings had been made as illustrations from Aristophanes' "Lysistrata," which itself was a tale of a compact among women in ancient Greece to deny their husbands sexual gratification until they ceased making war. A book entitled "The Collected Drawings of Aubrey Beardsley" edited by Bruce Harris Crown Publishers, Inc., New York, 1967, was introduced in evidence. It did not contain reproductions of all of his illustrations for Lysistrata, particularly the most controversial one followed by Piarowski in his windows; but it did account for the fact that "One of [Beardsley's] last acts, congruent with his conversion to Roman Catholicism, was to write a letter to his not very respectful publisher, Leonard Smithers, in which he [said]: 'I implore you to destroy *all* copies to Lysistrata and bad drawings. . . . By all that is holy *all* obscene drawings.' "

Piarowski's three windows were hung in a row with their backs illuminated by light from full-length structural windows that looked out onto the sidewalk and grounds in front of the school. The windows were set at an angle to allow for greater penetration of natural sunlight and to enable viewers to see the entire row at a glance. The three windows were each twenty inches wide and twenty-eight inches in length. They were displayed at eye level a few feet apart.

The Piarowski windows departed from Beardsley's drawings in two main respects. First, two of the three windows portrayed only a portion of the original drawings. Second, Piarowski by the use of stained glass added color where Beardsley's drawings all had been in black on white. In particular, depending on the angle and amount of light penetrating the stained glass, the skin color of the Piarowski female figures varied in color from light brown to dark brown. According to many observers they represented Negro women. In contrast, for example the skin color of a male figure in one window, "Adoration of the Penis," was unchanged. It was left white. In this window there was a female figure kneeling with her back to the viewer and with her face buried against the scrotum and between the testis of the exaggerated massive phallus of a white male figure, and with her arms and hands fully stretched worshipfully upward against the sides of its shaft.

Others of Piarowski's windows depicted women in various sexual and excretory positions. None of the windows bore a title, a description or a legend of any kind.

The exhibit had been open about a week when the President's Council met to discuss the stained glass windows. Dr. Creal, the president of Prairie State, and his four vice-presidents each had received complaints from students about the works. Most of the complaints had come from Negroes and from women, two groups Dr. Creal said the school was in the process of actively recruiting as students.

In addition, a group of cleaning women had lodged a protest with Mr. Ostenberg, who was not a member of the Council but who attended the meetings in his role as Director of Communications and Community Relations. Ostenberg testified that the general consensus at the meeting was that the depiction of a dark-skinned female kneeling before and caressing the aroused, exaggeratedly large penis of a white-skinned male would be considered offensive by the community. He also

expressed in his own opinion that although some people might object if the works were removed, from a simple public relations standpoint it was in the school's best interests to have them displayed in another gallery other than one on the main floor. That way, people could not see them from the front sidewalk and would not be forced to look at them upon entering the main floor mall; yet, they would be free to view them elsewhere if they chose. Consequently, it was decided that Dr. Andrews would try to persuade Piarowski to put them in another gallery, but failing that, Dr. Andrews would remove them himself.

Only half of the exhibit remained when Dr. Andrews asked Piarowski to remove the windows. On the following day, Dr. Andrews repeated the request in a written memorandum and offered to rehang the windows in a gallery on the fourth floor. Piarowski was nonplussed. In Piarowski's view, Gallery 417, on the fourth floor, was too small, too removed, and exclusively designed for the display of photography. He explained that to place his works there would fragment the exhibit and would suggest that the windows were somehow inferior. That same day, Thursday, Piarowski sent a reply memorandum stating that artistic policy dictated that he had to obtain the consent of the other contributing artists before he could remove any part of the exhibit. He said that he had scheduled a meeting with his fellow exhibitors on the following Monday to discuss the matter. In response, Dr. Andrews wrote that apparently Piarowski had not understood his demand. The windows would be taken down on Friday regardless of the art department's point of view. When the exhibitors met the following Monday, the windows had been removed. In apparent disgust, they voted to close the entire exhibit.

Piarowski then met with Dr. Creal to discuss the incident. Dr. Creal refused to permit Piarowski to return the windows to the first floor gallery, reasoning that their display did not create a good image for the college. He explained that he wanted to

avoid offending the community upon which Prairie State depended for financial support. Dr. Creal later testified that the many complaints he had received, both directly and indirectly, reflected the objections not only of the complaining individuals but of a larger group of people as well. He also stated that just because Piarowski had been asked to move his windows to a less visible area did not mean that his academic freedom had been abridged; he still was to be allowed to display them. Moreover, he testified, Piarowski had not lived up to his obligation under academic freedom to take into account the sensitivity of the community and its likely reaction to his art work.

At trial, the court also heard the contrasting viewpoints of a prominent community figure and a noted art expert. Mr. C. R. Gordon, president of both the Board of Trustees of the East Chicago Heights Public Library District and the East Chicago Heights Community Center Services, testified that when he had received complaints from members of the East Chicago Heights community, "ninety-eight percent of which is Black," he went to Prairie State to examine Piarowski's windows. In a subsequent letter to the college trustees he wrote that although he was "by no means a 'prude," he was shocked and offended by the display. He noted that many of his female constituents found them demeaning to women—"particularly Black women." Gordon asked that the Board "take appropriate steps in resolving this matter and reprimanding the individuals responsible."

In contrast, Professor Reinhold A. Heller, Chairman of the Art Department at the University of Chicago, testified as an expert witness that Piarowski's windows had serious artistic value. He also confirmed the artistic policy against fragmenting exhibits. In addition, Dr. Heller stated that the discretionary removal of art work without established standards would confuse students and faculty and would make contributing artists anxious about the fate of their own pieces. Under such

circumstances, he concluded, the exhibitions of art would be different indeed.

The evidence showed that the art faculty exhibit here was intended by the college to play an important role in the public relations of the college directed at the surrounding community in the same way that a faculty music recital would be used to foster community interest in the college and extoll the abilities of its faculty. The college intended to put itself in a favorable light through the art faculty exhibit as it would with any of its many other community oriented projects.

Our narrow inquiry here does not concern the inherent worth of the expression Piarowski sought or whether or not the stained glass windows were obscene or pornographic. It must be concluded from the evidence that the works do have some artistic value as the only expert who testified at trial, Dr. Heller, testified to this fact. The issue is whether the President of Prairie State Community College, acting pursuant to authority vested in him by the Board of Trustees, in order to stem a tide of indignation and outcry coming from the public it intended to attract, against the showing of the three pieces of artwork at the on-campus faculty exhibit open to the general public and advertised extensively in the surrounding area, may lawfully order these "pieces of art" removed and taken to a less obvious viewing area, without violating the faculty member's right to freedom of expression.

It is beyond doubt that a segment of the community, not limited to Negroes and women, found the works of art deeply insulting. Of course, this group included taxpayers, students, teachers and other members of the community whom the college drew upon for support.

The president of the college here was charged with responsibilities that went beyond ensuring the students a traditional education. Part of his responsibility is defined by the Illinois Constitution of 1970, Article X, which provides:

> A fundamental goal of the people of the State is the educational development of all persons to the limits of their capacities.
>
> The State shall provide for an efficient system of high quality public educational institutions and services.

This commitment to public education has been followed by the Illinois legislature which has enacted a comprehensive and detailed scheme establishing a Public Community College system (codified under Ill. Rev. Stat., Ch. 122, par. 102 *et seq.)* and which provided for a State-wide system of community colleges under the authority of an Illinois Community College Board. Further, under Ill. Rev. Stat. ch. 122, par. 102-8, each member of the Illinois Community College Board is required to take and subscribe to an oath supporting the Constitution of the State of Illinois, as is required by Section 3 of Article XIII of the Illinois Constitution.

While the Board of Trustees of the Community College District in which Prairie State was located established the Board policy and goals of the college, as a generally understood matter of course Dr. Andrews had responsibility for the day to day operation of the college. It was not required of him to elicit approval from the Board of Trustees for his day to day decisions. It was incumbent upon him, the president, as the highest ranking administrative officer of the college, to promote a positive image of Prairie State College within the surrounding communities.

The display of the artworks here had created a large controversy in the community and generated considerable negative publicity for the college. The cleaning ladies who worked nights at the main building of the school were the first to notice the stained glass windows and they complained to the administration. Students and other people from around the area joined in a public outcry against the works. The subject works had created an ugly atmosphere which reflected unfavorably upon the community college. And as a practical matter it

was an art faculty exhibit held on the property of the school, which migh lead some in the community to the conclusion that the school endorsed or condoned the racial or sexual messages embodied in the works. What all of these factors lead to is a situation in which the "art works" of Piarowski, placed in the art faculty exhibit held at the college to enhance the image of the school in the community, merged into the expression of the college. That is why when people complained they directed their complaints to Dr. Andrews and the vice-presidents of the college.

The legal conclusion is that when Dr. Andrews demanded that the pieces of stained glass displays be moved to a less obvious showing area and then ordered them taken down, he was reacting reasonably to enhance the image of the school and to ensure that it would at least remain in the eyes of the taxpayers and other members of the community as an efficient system of quality public education. This translates into the conclusion that there has been no violation of the right to freedom of expression here. This conclusion is buttressed by the reasonable request Dr. Andrews made originally that the works be moved to a less obvious viewing area, giving Professor Piarowski an alternative place in which to exhibit his works. In short, the first amendment does not require that a university itself publish or endorse any and all views or expression of its faculty members or students.

An issue which demands attention is whether Prairie State, a state institution, has created a public forum out of its first floor gallery, and if so, to what extent the Constitution limits the school's control over access to it. I begin by noting that the United States Supreme Court has stated that it "nowhere suggested that students, teachers, or anyone else have an absolute right to use all parts of a school building . . . for their unlimited expressive purposes. *Grayned v. City of Rockford,* 408 U.S. 104, 117-18 (1972). In addition, "[t]he right of access to public property and the standard by which limitations upon

such a right must be evaluated differ depending on the character of the property at issue." *Perry Education Association v. Perry Local Educators' Association,* 51 U.S.L.W. 4165, 4167 (1983).

In *Perry, id.*, the Supreme Court identified three types of forums along a spectrum of public accessibility. First, in public places traditionally devoted to assembly and debate, such as streets and parks, content-based regulations of expression must be narrowly drawn to achieve their purpose and must be supported by a compelling governmental interest. Alternatively, content-neutral regulations of the time, place, and manner of speech must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.*

The second category consists of "limited" public forums —forums which the state was not required to create but which it subsequently opened to the public. *See, e.g., Widmer v. Vincent,* 454 U.S. 263 (1981) (university meeting facilities); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975) (municipal theatre). As long as these areas remain open, government must adhere to the same standards that apply to traditional forums. *Perry,* 51 U.S.L.W. at 4168. The third category deals with "[p]ublic property which is not by tradition or designation a forum for public communication. . . ." *Id. See, e.g., Greer v. Spock,* 424 U.S. 828 (1976) (military base); *Adderly v. Florida,* 385 U.S. 39 (1966) (jail grounds). In these non-public forums, the state may enforce time, place, and manner regulations and reserve the area for its intended purpose "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. *Perry,* 51 U.S.L.W. at 4168.

The gallery in which Piarowski displayed his stained glass windows clearly falls into the category of non-public forums. The evidence shows that Prairie State created the gallery to hold exhibits by various college departments—especially, per-

haps, with the art department in mind. It was *not* intended, however, as a forum for the use of the general public. Rather, the gallery was designed to publicize the skill and ideas fostered at Prairie State; it was to be a showcase for a growing school within its proud community. Far from actively participating in displays to be held in the gallery, the public was the intended audience.

Moreover, neither did Prairie State create the gallery for the unrestricted use of a "public" consisting of the art department and other faculty groups. Whether or not it was considered a "permanent" fine arts gallery with Piarowski as one of its coordinators, the college administration retained a residual authority to oversee the operation of an area that was to be used by only a small, select number of its own people. By no means did the school authorities relinquish their jurisdiction over the gallery as by consigning it to the management of Piarowski and his co-coordinator, Mr. Sims.

Additionally, by comparison, the gallery in this case is considerably less accessible for any such public use as the interschool mail system in *Perry*. In that case, outside organizations such as the YMCA, Cub Scouts, civic and church groups had been allowed to use the mail system in addition to a teacher's union to which the privilege had been granted pursuant to the agreement by which the union became the teachers' exclusive representative. 51 U.S.L.W. 4165. In contrast, no outside groups had held displays in the gallery at Prairie State, and among the faculty the art department had been assigned the greatest use of it. In light of the fact that "the First Amendment does not guarantee access to property simply because it is owned or controlled by government," *United States Postal Service v. Greenburgh Civil Ass'ns.*, 453 U.S. 114, 129 (1981), such an area as this cannot be considered either a public or limited public forum either by tradition or designation.

Under the applicable law, the state may regulate speech in non-public forums as long as the regulation is reasonable and not intended to suppress a point of view that public officials personally find objectionable. *Perry,* 51 U.S.L.W. at 4168. Considering the circumstances of this case, it cannot be said that the acts of these school officials were unreasonable or primarily motivated by any personal distaste for Piarowski's "artistic" expressions. It is the responsibility of school administrators to act in what they consider are the best interests of the institution. Especially in the setting of a community college, they must be concerned with maintaining a positive relationship between the school and the community from which it draws students and upon which it depends for financial support. Consequently, it might well be expected that school authorities would decide to remove displays which have given rise to numerous complaints from a partially Negro community to the effect that needlessly the displays were highly degrading and insulting to Negro and women members of that community.

Whether or not the officials themselves considered Piarowski's windows offensive, however, is not at issue here, neither factually nor legally. Rather, according to the greater weight of the evidence, we are dealing with management's perception of feelings created among the college's students, its employees, and the members of its surrounding community. This is what caused them to take the step they knew would be resented by some members of their faculty. It is difficult to understand why Piarowski, a long-time resident of the area, could not have anticipated the reaction of the community to his display, except that to the trier of fact his appearance and demeanor on the witness stand spoke an unawareness of certain contemporary sociological facts. It is understandable that the college's authorities clearly believed that Piarowski probably was naively on the way to needlessly damaging what had been excellent community to institution rapport. Reasonableness in the actions of the school authorities was their offer of an alternative and somewhat comparable area in which Piarowski

could rehang his windows without their display damaging the school. *See Perry,* U.S.L.W. at 4170.

An argument asserted on behalf of the defendants is that the actions of the college were justified because there was a captive audience exposed to the display of the windows. While this question need not be reached, there is evidence supporting it as an alternative reason for this court's decision. The rule is that government may restrict expression under this theory if "substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California,* 403 U.S. 15, 22 (1971). A corollary of the rule is that when the state attempts to shield the public from certain speech because of its allegedly offensive nature, "[s]uch selective restrictions [will be] upheld only when the speaker intrudes on the privacy of the home, . . . or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 209 (1975). Although the captive audience theory is to be applied in especial and "narrow circumstances," *id.* at 210, the instant case appears to present the limited kind of situation contemplated by the Supreme Court under that doctrine.

It is generally understood that in our society we must expect to be confronted now and again with expression that will strike us personally as offensive. *See id.* at 210-11. There, of course, is a price we each must pay to preserve any one of those fundamental freedoms enjoyed by all persons among us. And generally, the viewer bears the burden of averting his eyes. *Id.* Nevertheless, the right to exercise a First Amendment freedom is not absolute. *Cohen,* 403 U.S. at 19. Like the freedom of press or the freedom of religion, this constitutional right of speech or other expression of a communicative nature does not exist in a vacuum. It must be considered in the light of the facts unique to each case. *Erznoznik,* 422 U.S. at 209. The captive audience analysis compels us to examine the right of members of the public to be free from a forced or unavoidable confrontation with an assertedly offensive or insulting expression.

The cleaning women have been mentioned before. They, for example, in cleaning the mall would have had to go right up to the art works on display. They could not avoid seeing and being offended by the Piarowski windows. To avoid the exposure would have been job threatening. Students unaware that the exhibits were offensive would have passed within a few feet of them without warning when moving about in the mall or when walking into the mall from the building's main entrance. There was some evidence that the Piarowski works could be seen through the windows from the sidewalks by anyone passing in front of the building. That Prairie State is a local school serving a local community of mixed ethnicity accounts for the fact that the hand bills advertising the exhibit were distributed in the public schools of the villages. They contained no warnings or disclaimers about Piarowski's works. And the works themselves carried no legends or explanations to tell the viewer anything about the Greek mythology either Beardsley or Piarowski were illustrating. If the viewer knew the myth, he or she would have found the Piarowski improvisation of it speaking loudly a white chauvinism which was not a part of the Beardsley message as well as the male chauvinism which was. Currently both chauvinisms are increasingly being considered universally repulsive.

So, for example, a person passing through the college mall area might be surprised and even angered by the contents of a leaflet handed to him or her by a member of the Spartacus Youth League, but the leaflet easily could be disposed of, and along with it the contents and the anger. *See Spartacus Youth League v. Board of Trustees*, 502 F.Supp. 789 (N.E. Ill. 1980). That would not be the case with the Piarowski displays.

The captive audience theory is made available for use by the facts in the instant case. Its importance here is its corroboration of circumstances justifying the approval of the use of a reasonable restraint by an institutional administrator in a situation wherein the exercise of administrative authority in

pursuit of the best interests of the institution with relation to the expression of an employee as a part of a work product of the institution was allowable. Dr. Piarowski's display, in the setting in which it was used, was not private to him. It involves his contributing voluntarily or by implied request to an expression of the school made to the community. It was part of the school's saying to the community, "Like our college. Support it. Encourage members of your family to attend it. *See, here is an example of the excellence of our art faculty.*" The usual conception of Dr. Piarowski's freedom of expression, when thought of as we think of the private right of a person to say what he chooses without being censored, a conception with which "academic freedom" often is confused, is not an apt characterization of what was involved here. His freedom in this instance, within the intentions of the framers of the Constitution, could lawfully be reasonably required to give away to the best interests of the institution.

In summary, what we have here is the use by a college faculty member as a part of the College's public relations program, of a non-public forum, *Perry,* 51 U.S.L.W. at 4168, under circumstances whereby certain members of the intended public would turn out to constitute a captive audience, *Cohen,* 403 U.S. at 19, *Erznoznik,* 422 U.S. at 209, in a manner that would offend the public and defeat the purposes of the school. Wherefore, a reasonable administrative restraint placed upon his performance did not violate his First Amendment right to freedom of speech. Accordingly, I find for the defendants and against the plaintiff on all issues raised by his complaint, and assess against him the costs and the reasonable attorneys fees of the defendants, who are the prevailing parties.

ENTER:

JAMES B. PARSONS

James B. Parsons
U.S. District Court Judge

DATED: December 29, 1983.

In the

# United States Court of Appeals

## For the Seventh Circuit

No. 84-1152

ALBERT R. PIAROWSKI,

*Plaintiff-Appellant,*

*v.*

PRAIRIE STATE COLLEGE, et al.,

*Defendants-Appellees.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 80 C 5309—James B. Parsons, *Judge.*

ARGUED FEBRUARY 26, 1985—DECIDED APRIL 12, 1985

Before WOOD and POSNER, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge.*

POSNER, *Circuit Judge.* Prairie State College is a junior college owned by the State of Illinois and located just to the south of Chicago; it has 6,000 students. Albert Piarowski is the chairman of its art department. The president and other top officials of the college, defendants along with the college in this federal civil-rights suit under 42 U.S.C. § 1983, ordered Piarowski to remove from a public exhibit in the college three works of art that he had created and was displaying there. He claims that by doing this the defendants (whose action, none deny, was state action) violated his rights under the First Amendment, made applicable to the states by interpretation of the Fourteenth Amendment. After a bench trial, the district court gave judgment for the defendants, and Piarowski appeals. Although the underlying dispute is not rare in the art world, see DuBoff, The Deskbook of Art

Law, ch. VIII (1977), we have found only two cases that resemble this. In *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970), an art instructor at a state university, after being invited to exhibit his paintings in a busy corridor, was made to remove them because they were sexually explicit; the First Circuit found no violation of the First Amendment. *Appelgate v. Dumke*, 25 Cal. App. 3d 304, 101 Cal. Rptr. 645 (1972), has similar facts, but went off on waiver grounds.

On the main floor of Prairie State College's principal building is a large open area, the "mall." A room 27 feet by 21 feet in size, the "gallery," adjoins the mall near the entrance to the building. No wall separates the gallery from the mall; the gallery is thus an alcove off the mall. A cafeteria, a book store, and a number of other facilities also open onto the mall, and the part of the mall that adjoins the gallery doubles as a student lounge. The mall is the college's main gathering place and thoroughfare; the classrooms are on the upper floors of the same building.

Piarowski and another member of the art department are the gallery coordinators, meaning that they are in charge of arranging art exhibits for the gallery—exhibits of student work picked by members of the faculty, exhibits of the work of outside artists invited by the coordinators, and finally exhibits of art work by members of the faculty. The college has set no criteria for picking works to be exhibited in the gallery, leaving the matter to the coordinators' judgment.

On March 3, 1980, the "Art Department Faculty Exhibition," an annual affair to which the coordinators invite all the members of the department to contribute (there are four full-time members), opened with works by all four members. Each had decided which of his works to exhibit. Piarowski contributed eight stained-glass windows. Five were abstract; three were representational and became the focus of controversy. One depicts the naked rump of a brown woman, and sticking out from (or into) it a white cylinder that resembles a finger but on

careful inspection is seen to be a jet of gas. Another window shows a brown woman from the back, standing, naked except for stockings, and apparently masturbating. In the third window another brown woman, also naked except for stockings and also seen from the rear, is crouching in a posture of veneration before a robed white male whose most prominent feature is a grotesquely outsized phallus (erect penis) that the woman is embracing.

Although when described in words the three stained-glass windows (especially the third) sound pretty obscene, the defendants do not argue that the windows are obscene in the legal sense. The windows are not very realistic; seem not intended to arouse, titillate, or disgust; and are not wholly devoid of artistic merit, or at least artistic intention. They are in the style of Aubrey Beardsley, the distinguished *fin de siècle* English illustrator. Two of Piarowski's windows are imitations of two of Beardsley's illustrations for *Lysistrata*, Aristophanes' comedy, itself sexually explicit, about wives who go on a sex strike in an effort to end the Peloponnesian War. On his deathbed Beardsley ordered his illustrations for *Lysistrata* destroyed as obscene, Weintraub, Aubrey Beardsley: Imp of the Perverse 258 (1976), but the order was not carried out; and though some of the illustrations, with their immense and graphic phalluses, see, e.g., Wilson, Beardsley, pl. 38 (3d ed. 1983), might well be considered indecent even today, the originals are on public display in—with nice irony—the Victoria and Albert Museum. See Weintraub, *supra*, at 199 n. 1. The window with the phallus is based on a forged Beardsley drawing entitled "Adoration of the Penis."

Piarowski testified that he never intended the women in the windows to be taken to be Negro women; he used brown glass (he said amber, but the women in two of the windows are darker than that) for contrast. The women could, indeed, be taken to be Polynesian rather than Negro (but they are too dark to be Greek). Of course the "Adoration of the Penis" window would not have been less offensive if the man had been dark and the woman light.

The three windows were clearly visible from the mall, and they provoked a number of complaints from students, cleaning women, and black clergymen, though it is not clear that the clergymen actually saw the windows. Prairie State College serves a community in which Aubrey Beardsley is not a household word; almost half the students are night students, three-fourths are part-time rather than full-time students, and the college has no admission requirements. Anyway the exhibit did not mention Beardsley. After ten days the defendants ordered Piarowski to remove the windows. They suggested he exhibit them in a room on the fourth floor (the floor on which the art department's classrooms are located) that in its one year in use as an exhibit room had been used only for exhibiting photography. The room is smaller than the gallery (10 feet by 25 feet) but large enough to hold all of Piarowski's windows and indeed the whole exhibit. Although the room was being used for another exhibit at the time and it appears, though not clearly, that it would not have been free till the summer (the college is in session during the summer), the defendants may not have known that the room was in use—there is nothing in the record on this question. And they may, for all we know, have been willing to move the photography exhibit somewhere else. Their directive to Piarowski left room for counterproposals: "... the three stained glass pieces ... are to be removed from the mall of the college as soon as possible. If you feel that an alternative place for exhibiting these pieces is needed, the gallery on the fourth floor will be acceptable. Thank you for your cooperation." No counterproposals were forthcoming. Piarowski did not even tell the defendants that the fourth-floor room was occupied. Apparently his objection to exhibiting the windows in that room was not that it was unavailable but that it was out of the way and, more important, that the exhibit should not be broken up.

When Piarowski refused to remove the windows, one of the defendants removed them. That was on Friday,

March 14. On Monday the art department voted to close the exhibit rather than break it up and it closed two weeks after it had opened, which is to say a week before it was scheduled to close. In retrospect the defendants might have been wiser to have suffered the exhibit to continue intact for another week and have thereby avoided this lawsuit.

Piarowski intended no political statement by the content and coloring used in his windows, no disparagement of women or blacks, no commentary on relations between the sexes or between the races. The windows were art for art's sake. But the freedom of speech and of the press protected by the First Amendment has been interpreted to embrace purely artistic as well as political expression (and entertainment that falls far short of anyone's idea of "art," such as the topless dancing in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-34 (1975)), unless the artistic expression is obscene in the legal sense. See, e.g., *Miller v. California*, 413 U.S. 15, 34-35 (1973). And if the college had opened up the gallery to the public to use as a place for expression it could not have regulated that expression anyway it pleased just because the gallery was its property, *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), or because the artist happened to be a member of the college's faculty. Cf. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Knapp v. Whitaker*, Nos. 84-1032, 84-1060 (7th Cir. March 5, 1985). The artist's status as an employee would give the college more control over his activities than over a stranger's, cf. *id.*, slip op. at 28; *McMullen v. Carson*, No. 83-3579, slip op. at 2336-37 (11th Cir. March 8, 1985); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972) (per curiam), but not unlimited control.

But the public was not allowed to exhibit in the gallery; unlike the municipally operated theater in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), where outside producers put on plays for the entertainment of the general public, the gallery was not generally available for outsiders to use to display their work. That

Piarowski sometimes invited artists from outside the college to exhibit their work in the gallery no more made the gallery a public forum than a teacher's inviting a guest lecturer to his classroom would make the classroom a public forum. The record is silent on how often the work of outside artists was exhibited. The district judge found that the gallery was never used by outsiders, which is clearly wrong. But Piarowski strays from the record, too, when he says in his brief that outsiders were "regularly invited" to exhibit in the gallery—there just is no evidence of that. Occasional use by outsiders, which is all that this record shows, is not enough to make a college art gallery a public forum. See *Perry Education Ass'n v. Perry Local Educators' Ass'n*, *supra*, 460 U.S. at 47.

Although *Widmar v. Vincent*, 454 U.S. 263 (1981), held that a state university could not bar religious student groups from its facilities while letting secular student groups use them, the student groups were autonomous; their relationship to the university administration was the same as that of the theatrical producers in *Southeastern Promotions* to the municipal theater. Prairie State College has not given student groups free access to the gallery, and Piarowski is not a student; indeed, as chairman of the art department and gallery coordinator, he is a part of the college administration. Faculty, unlike students, are employees, and it would make nonsense of the concept of public forum to say that because the employees of a public employer naturally have the use of the employer's property, which is where they work, it is a public forum. They are not members of the public.

We may assume, however, that public colleges do not have carte blanche to regulate the expression of ideas by faculty members in the parts of the college that are not public forums. We state this as an assumption rather than a conclusion because, though many decisions describe "academic freedom" as an aspect of the freedom of speech that is protected against governmental abridgment by the First Amendment, see, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion); *id.* at 262-63

(concurring opinion); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1274-76 (7th Cir. 1982); *Gray v. Board of Higher Education*, 692 F.2d 901, 909 (2d Cir. 1982); Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U.L. Rev. 1176 (1973), the term is equivocal. It is used to denote both the freedom of the academy to pursue its ends without interference from the government (the sense in which it used, for example, in Justice Powell's opinion in *Bakke v. Regents of the University of California*, 438 U.S. 265, 312 (1978), or in our recent decision in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 335-36 (7th Cir. 1983)), and the freedom of the individual teacher (or in some versions—indeed in most cases—the student) to pursue his ends without interference from the academy; and these two freedoms are in conflict, as in this case. The college authorities were worried that Piarowski's stained-glass windows, created by the chairman of the college's art department and exhibited in an alcove off the college's main thoroughfare, would convey an image of the college that would make it harder to recruit students, especially black and female students. If we hold that the college was forbidden to take the action that it took to protect its image, we limit the freedom of the academy to manage its affairs as it chooses. We may assume without having to decide that the college's interest was not great enough to have justified forbidding Piarowski to display the windows anywhere on campus, but it may have been great enough to justify ordering them moved to another gallery in the same building. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), after all, upheld an ordinance regulating the location of "adult" movie theaters; and the plurality opinion states that sexually explicit though nonpornographic art can be regulated more broadly than political speech. See *id.* at 70. It cannot on that account be suppressed altogether; but as *Young* suggests, relocation is not suppression, and if reasonable is not forbidden.

This conclusion holds even if we are wrong to think the gallery not a public forum. If it was one, then so was

the photography gallery on the fourth floor, and any other room in the main building that would have been suitable for the exhibit; and all together could be viewed as a single public forum for the exhibition of art. A decision as to where within a public forum to display sexually explicit art is less menacing to artistic freedom than a decision to exclude it altogether.

The concept of freedom of expression ought not be pushed to doctrinaire extremes. No museum or gallery, public or private, picks the most prominent place in the museum to display those works in its collection that are most likely to offend its patrons; and even though the consequence of its decision is to discourage—though very mildly we should think—the production of art calculated to shock, to outrage, to *épater le bourgeois*, we do not think the decision has constitutional significance. If Piarowski had given to the man's face in his pastiche of "Adoration of the Penis" the unmistakable likeness of the chairman of the college's board of trustees, we doubt that we would be hearing the argument that the First Amendment prevents any tampering with the siting of a work of art; it would be reasonable in such a case for the college to order the stained-glass window moved to a less conspicuous spot on the campus—especially when the window had been created by an employee of the college, and not just by any employee but by the chairman of the art department and gallery coordinator. Coming closer to the actual facts of this case, if Piarowski had entitled the windows, "Typical Prairie State Coeds," we do not think the college would have been forbidden to order the windows moved to a more discreet location. Or if a member of the art department had submitted such a work of art for display at an exhibit, Piarowski would not have violated the First Amendment by refusing, in his capacity as gallery coordinator, to display it in a conspicuous place. If Claes Oldenburg, who created a monumental sculpture in the shape of a baseball bat for display in a public plaza in Chicago, had created instead a giant phallus, the city would not have had to display it next to a heavily traf-

ficked thoroughfare. The first-floor gallery in Prairie State College's main building is a place of great prominence and visibility, implying college approval rather than just custody, and the offending windows could be seen by people not actually in the gallery. There is no constitutional right to exhibit sexually graphic works of art in a gallery that is missing an outside wall.

At argument Piarowski's able counsel conceded that there would have been no violation of the First Amendment if the defendants had put up venetian blinds to screen the gallery from the mall. This concession acknowledges, quite properly in our view, the existence of some scope for a managerial judgment concerning access to sexually frank pictorial art, even a judgment influenced by the offensive nature of the art. Cf. *Avins v. Rutgers*, 385 F.2d 151 (3d Cir. 1967). But we are told that while Piarowski could not have compelled the college to allow him to exhibit offensive art works in the most prominent place of exhibition, once they were exhibited they could not be ordered moved, even to another gallery in the same building; that having delegated the organizing of exhibits in the gallery to Piarowski and another art professor, the college was constitutionally required to forgo any participation in those decisions—even though Piarowski, when forced to decide whether to exhibit his own work, had a potential conflict of interest between his career objectives as an artist and his managerial responsibilities as a gallery administrator.

Neither the distinction between location and relocation nor the concept of irrevocable delegation is a persuasive ground for reversing the district court. What the parties call the gallery is not to be compared to the National Gallery of Art in Washington, D.C. A room of modest dimensions, it is not even the entire exhibit space of the college, for we know that photographic art is exhibited in a different, although smaller, room on a separate floor. As for the idea that there is a ratchet in play, such that the college could have prevented Piarowski

from exhibiting the three stained-glass windows in the gallery in the first place but could not order them removed, we cannot imagine what policy of the First Amendment would be served by making sequence determine outcome. The college authorities did not have to ignore the controversy created by Piarowski's windows. If the college had done nothing it might have been thought to be endorsing the windows by allowing them to be displayed so prominently right off the main thoroughfare, and near the main entrance, of the college. Piarowski's positions as chairman of the art department and gallery coordinator, to the extent known, would enhance the impression of official approval. And while hanging venetian blinds might have limited the audience for the stained-glass windows less than moving them to a less conspicuous exhibition site, we do not think the Constitution requires drawing such fine lines. If the gallery had had two rooms, a front and a back, and the defendants instead of putting up venetian blinds had told Piarowksi to move his windows to the back room, the abridgment of free expression would have been trivial. Instead the college had (at least) two rooms, in the same building, suitable for exhibits—only the rooms were not contiguous. The difference between a walk and an elevator ride is not of constitutional dimensions.

If showing Piarowski's work separately from that of the other artists represented in the exhibit might have reduced the exhibit's quality, Piarowski could have suggested moving the entire exhibit to another room, which he did not do. But the premise is in any event dubious. Since the exhibit was simply a group of self-selected works by the members of the department, it is not obvious that it had an artistic integrity to be violated. Piarowski testified that the three objectionable windows were "totally different" from his five other windows (which were abstract rather than representational), although he wanted them exhibited together in order to demonstrate the versatility of stained glass as an artistic medium.

To hold the defendants liable to Piarowski for ordering his work relocated would have disturbing implications for the scope of federal judicial intervention in the affairs of public museums and art galleries. Distinguished public galleries such as the Metropolitan Museum of Art in New York and the National Gallery of Art in Washington would have to worry that if they refused to flaunt their most offensive works of art they might be held to have violated the constitutional rights of artist, donor, or viewer. Nor would it be right to equate Piarowski and the art department to the museum, and the college administrators to a state agency telling the museum what it can and can't exhibit, and where. The gallery was a single room in the college. Piarowski was no more its proprietor than a junior curator at the Metropolitan Museum of Art is the proprietor of the displays he arranges. It cannot be right that if any authority whatever is delegated to a curator, the owner of the museum—the college in this case—is helpless to correct the curator's errors of taste. The precept that in museum management "good taste is the first refuge of the witless," Museum of the City of New York, Explorations of the Ways, Means, and Values of Museum Communication With the Viewing Public 53 (1969) (remarks of Harley Parker); but see Burcaw, Introduction to Museum Work 177 (1975), is not yet engraved in constitutional law.

We emphasize that the college did not offer Piarowski the fourth-floor gallery as an alternative site on a take-it-or-leave-it basis, and may not have known it was already occupied. The college was apparently open for counterproposals, but none were forthcoming. The idea of venetian blinds—even of a disclaimer of college sponsorship or endorsement—was not forthcoming. Piarowski did not tell the defendants that the fourth-floor gallery was occupied, which might have caused the defendants to rethink their edict of removal, especially since the exhibit had only 10 days left to run when the storm arose. Common sense tells us that the chairman of the art

department must have known better than anyone else in the college which if any alternative sites might be acceptable to show his art; and if none were acceptable, he should have said so, and did not. He seems to have been more interested in becoming a martyr to artistic freedom than in finding another room in the building to exhibit his work, or persuading the defendants to back off by demonstrating to them the absence of any reasonable alternatives, though we hesitate to conclude that he waived his First Amendment rights like the artist in *Appelgate v. Dumke, supra.*

This is an easier case than *Close v. Lederle, supra,* where the issue was removal, not relocation, though there was a finding there, and not here, that children used the corridor in which the offensive art was hung. If the defendants had said to Piarowski, you cannot exhibit such work anywhere on campus, Piarowski might have been discouraged from creating similar work in the future; for Prairie State College is the most natural site for a member of its art department to exhibit his work. The discouragement is much less, and hence the abridgment of freedom of expression is less, when the college says to him, you may exhibit your work on campus—just not in the alcove off the mall. Although this location maximized the artist's audience, the impact, both on his incentive to create controversial works of art and on the accessibility of those works to the viewing public, of moving it to another place (and we do not mean the broom closet) in the same building would have been slight.

*Sefick v. City of Chicago,* 485 F. Supp. 644 (N.D. Ill. 1979), which questioned *Close* en route to invalidating the revocation by the City of Chicago of permission to display sculptures in the lobby of a city building, is distinguishable from the present case both because the motive for revocation was political (the sculptures satirized the city's mayor) and because the issue, as in *Close,* was removal rather than relocation. Not every trivial alteration of the site of an art exhibit—not every modest

yielding to public feeling about sexually explicit and racially insulting art—is an abridgment of freedom of expression.

When we consider that the expression in this case was not political, that it was regulated rather than suppressed, that the plaintiff is not only a faculty member but an administrator, that good alternative sites may have been available to him, and that in short he is claiming a First Amendment right to exhibit sexually explicit and racially offensive art work in what amounts to the busiest corridor in a college that employs him in a responsible administrative as well as academic position, we are driven to conclude that the defendants did not infringe the plaintiff's First Amendment rights merely by ordering him to move the art to another room in the same building. The judgment of the district court dismissing the complaint is therefore

AFFIRMED.

A true Copy:
Teste:

.....
*Clerk of the United States Court of Appeals for the Seventh Circuit*

USCA 50234—Pandick Midwest, Inc., Chicago—4-12-85—450

# United States Court of Appeals

## FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

May 10, 1985.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Senior Circuit Judge*

ALBERT R. PIAROWSKI,
*Plaintiff-Appellant,*

*vs.*

ILLINOIS COMMUNITY COLLEGE DISTRICT 515, PRAIRIE STATE COLLEGE, et al.,
*Defendants-Appellees.*

No. 84-1152

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80 C 5309

**Hon. James B. Parsons,** Judge.

## ORDER

On April 26, 1985, plaintiff-appellant filed a petition for rehearing with suggestion for rehearing *en banc.* All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc.* The petition is therefore DENIED.

No. 85-610

Supreme Court, U.S.
FILED
NOV 8 1985
JOSEPH F. SPANIOL,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

ALBERT R. PIAROWSKI,

*Petitioner,*

*v.*

ILLINOIS COMMUNITY COLLEGE DISTRICT 515, PRAIRIE STATE COLLEGE; RICHARD CREAL, President of Prairie State College; H. ROBERT ANDREWS, Vice-President for Instructional Services, Prairie State College; DR. JAMES H. GRIFFITH, MRS. LILLIAN J. BLECHSCHMIDT, MRS. ALMA L. MARTIN, MR. PAUL C. FRAKES, MR. JOSEPH HAWKINS, MR. CHARLES R. MASON, and MR. MICHAEL F. SHANLEY, members of the Board of Trustees of Prairie State College; all individually and in their official capacity, THOMAS G. GARDINER, MICHAEL R. MONTELEONE, DAVID M. AMADIO, JAMES S. TEYKL, and CARL TRIEBOLD, all in their official capacity as Members of the Board of Trustees of Prairie State College.

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether speech by a faculty member in his official capacity, which damages the reputation of a community college, may be removed from a community college gallery and exhibition dedicated exclusively to speech which promotes the image of the community college, to another exhibition space in the same building.

2. Whether all of the exhibition space in the main building of a community college constitutes one forum, or whether each area of exhibition space in the building constitutes a separate forum for First Amendment purposes.

3. Whether the guard at the gate of the gallery, petitioner, is immune under the First Amendment from supervision by his superior, the respondent community college, with respect to works which the guard allows to be exhibited in the gallery.

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IN THE

# Supreme Court of the United States

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ALBERT R. PIAROWSKI,

*Petitioner,*

*v.*

ILLINOIS COMMUNITY COLLEGE DISTRICT 515, PRAIRIE STATE COLLEGE; RICHARD CREAL, President of Prairie State College; H. ROBERT ANDREWS, Vice-President for Instructional Services, Prairie State College; DR. JAMES H. GRIFFITH, MRS. LILLIAN J. BLECHSCHMIDT, MRS. ALMA L. MARTIN, MR. PAUL C. FRAKES, MR. JOSEPH HAWKINS, MR. CHARLES R. MASON, and MR. MICHAEL F. SHANLEY, members of the Board of Trustees of Prairie State College; all individually and in their official capacity, THOMAS G. GARDINER, MICHAEL R. MONTELEONE, DAVID M. AMADIO, JAMES S. TEYKL, and CARL TRIEBOLD, all in their official capacity as Members of the Board of Trustees of Prairie State College,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## BRIEF FOR RESPONDENTS IN OPPOSITION

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## STATEMENT OF THE CASE

The trial court made the following findings of fact, either affirmed or not challenged in the Court of Appeals. See Appendix to Petition, pp. 2a-30a.

Respondents are a two-year community college ("Prairie State") in the suburban Chicago area, the members of its board of trustees, and several of its administrators. Respondents prepare students for transfer as upperclassmen to four-year colleges or give them career vocational training, and furnish general community educational programs. The community college district is racially diverse. Prairie State depends upon financial support through taxes extended upon real property within its district.

Petitioner is the chairman of the art department of Prairie State.

The first floor of the main building of Prairie State features a mall or multi-purpose area which is taken up with administrative offices, two cafeterias, a library, lounge areas, and rooms devoted to student activities and student government. Also on the first floor, alcoved off the mall and next to the main entrance of the building, is a gallery.

Prairie State created the gallery to hold exhibits by its various departments. It was designed to publicize the skill and ideas fostered at Prairie State. It was to be a showcase for a growing school within a proud community.

The gallery was not intended as a forum for use by the general public. Far from actively participating in displays to be held in the gallery, the public was the intended audience. Nor did Prairie State create the gallery for the unrestricted use of a "public" consisting of the art department and other faculty groups.

The community college administration retained authority to oversee the operation of the area, which was to be used by only a small, select number of its own people. Petitioner was delegated by the administration to select works to be displayed in the gallery.

An exhibit of the four full-time art department faculty members began in the gallery on March 3, 1980, and was scheduled to continue for three weeks. Prairie State intended the faculty exhibit to play an important role in its public

relations directed at the surrounding community. It intended to put itself in a favorable light through the art faculty exhibit.

Notices of the exhibition were placed by Prairie State's public relations specialist in the local press. Posters advertising it were placed throughout the community college. Flyers were distributed seeking to attract people from nearby schools and colleges and representatives of the community at large. The advertisements announced that photography, painting, drawing and stained glass by the art faculty would be on display.

The subjects of this lawsuit are three stained glass windows displayed by petitioner in the gallery as part of the art faculty exhibit. One window depicted from the rear what would easily be presumed to be a nude Negro woman engaged in sexual self-stimulation. Another depicted from the rear what would easily be presumed to be a nude Negro woman kneeling and embracing a symbolically massive phallus of a white man. The woman had her face buried against the scrotum and between the testes of the exaggerated phallus, with her arms and hands fully stretched worshipfully upward against the sides of its shaft. The third window depicted a woman in an excretory position. The windows were each twenty inches wide and twenty-eight inches in length. They were displayed at eye level a foot apart.

The exhibit had been open one week when the respondent administrators and several other community college officers met to consider their response to complaints they had received about the windows. Cleaning ladies complained to them. Students and others from the area joined in a public outcry against the works. Most complaints came from Negro women. Another segment of the community, not limited to Negroes and women, found the works of art deeply insulting. This group included taxpayers, students, teachers and other members of the community whom Prairie State drew upon for support. The exhibit generated considerable negative publicity for Prairie

State. The windows had created an ugly atmosphere which reflected unfavorably upon the community college.

The windows, placed in the art faculty exhibit held at the community college to enhance the image of Prairie State in the community, merged into the expression of the community college. Petitioner's display, in the setting in which it was used, was not private to him. Petitioner was contributing to an expression by Prairie State to its community. It was part of Prairie State saying to the community: "Like our college. Support it. Encourage members of your family to attend it. See, here is an example of our faculty."

Respondents decided to try to persuade petitioner to display the three windows elsewhere in the same building. They offered to rehang the windows in a gallery on the fourth floor. As the Court of Appeals noted, the fourth floor was served by an elevator from the first floor. The fourth floor gallery was a less obvious viewing area. Petitioner rejected this request, and the windows were taken down from the first floor gallery.

Respondents dealt with their perception of feelings created among the community college's students and employees, and the members of its surrounding community. This is what caused them to act as they did. Respondents believed that Piarowski probably was naively on the way to needlessly damaging what had been excellent community-to-institution rapport. To the trier of fact Piarowski's appearance and demeanor on the witness stand spoke an unawareness of certain contemporary sociological facts.

The trial court ruled in favor of respondents on all issues. The Court of Appeals affirmed that judgment.

## SUMMARY OF ARGUMENT

In the last three years the Court has twice identified and discussed the standards governing access to government fora. No further pronouncement on this issue is necessary.

Petitioner was offered alternative exhibition space in the same building. Only one forum is at issue here, namely, the exhibition space in the entire building. Regardless of whether this forum is characterized as public, limited public, or non-public, petitioner was granted access to it.

Neither the general public, nor a limited public consisting of the faculty of Prairie State, was granted unrestricted access to the forum. Respondents retained at all times control over the forum.

## ARGUMENT

### I. Two Decisions By The Court In The Last Three Years Have Settled The Issue Of Access To Government Fora.

The Court thoroughly discussed the issue of access to government fora in *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983). Three categories of fora were established: a traditional public forum; a limited public forum; and a non-public forum. These categories were presented as a continuum. A government could engage in the least regulation in a traditional public forum, and the most regulation in a non-public forum. That *Perry* is still good law is illustrated by *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. ____, 105 S.C. 3439 (1985). *Cornelius* quotes extensively from and relies entirely upon *Perry* in its consideration of the public forum aspect of that case.

The Court has clearly established its position on the issue of access to government fora. Therefore, no further review of the issue is necessary.

The issue of academic freedom is a red herring. Academic freedom does not give petitioner more protection for his expression than does the First Amendment.

### II. Petitioner's Speech Was Not Suppressed.

Respondents offered petitioner alternative exhibition space in the same building. The decision to move the windows from one display area to another in the same building does not, therefore, amount to suppression of speech.

The forum at issue is exhibition space, not merely on the first floor, but in the entire building. In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), the Court struck down a zoning ordinance banning live entertainment. Critical to the Court's holding was that fact that there was "no evidence in this

record to support the proposition that the kind of entertainment appellants wish to provide is available *in reasonably nearby areas." Id.* at 76 (emphasis supplied). In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the Court allowed a location restriction. The Court stressed, however, that "[t] he situation would be quite different if the ordinance had the effect of *suppressing, or greatly restricting access to,* lawful speech." *Id.* at 71, n. 35 (emphasis supplied). In *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), the plaintiff sought to place political ads on city buses. The Court defined the forum at issue to be *all* city buses. Alternate display areas in the main building were close to the first-floor gallery. Access to these alternate areas was not restricted.

Because all exhibition space in the main building is part of the same forum, a decision that this forum is public, limited public or non-public is superfluous. Regardless of which it was, petitioner was not denied access to it. He was offered regulated access to it. Even access to a public forum can be regulated if reasonable—e.g., police barriers to keep strikers in a picket line from spilling into the street.

## III. The Lower Courts Properly Applied This Court's Analysis To The Issue Of Petitioner's Access To Respondents' Forum.

Under *Perry* and *Cornelius,* the appropriateness of government regulation can only be determined through analysis of both the expression and the forum in which it occurs. Petitioner's arguments emphasizing the importance of protected speech only beg the question of the appropriate level of protection to be accorded his speech. As the Court stated in *Cornelius:*

> The conclusion that the solicitation which occurs in the CFC is protected speech only begins our inquiry. Even protected speech is not equally permissible in all places and at all times. . . . Recognizing that the Government, "no

> less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated," *Greer v. Spock,* 424 U.S. 828, 836 96 S.Ct. 1211, 1217, 47 L.Ed. 2d 505 (1976), the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Id.,* 473 U.S. at ____, 105 S.Ct. at 3448.

The trial court found that:

> It [the gallery] was *not* intended, however, as a forum for the use of the general public. (App. to Petition, p. 13a; emphasis in original.)

The Court of Appeals affirmed, holding that the public was not allowed to exhibit in the gallery and that Prairie State's practice of inviting occassional outside exhibitors was insufficient to amount to a *de facto* designation of the area as a public forum.

Although petitioner asserts that the lower courts analyzed only the rights of the general public, the trial court reached and resolved the issue of a more limited public, stating:

> Moreover, neither did Prairie State create the gallery for the unrestricted use of a "public" consisting of the art department and other faculty groups. . . . the college administration retained a residual authority to oversee the operation of an area that was to be used by only a small, select number of its own people. (App. to Petition, p. 13a.)

Even if control had been passed to the faculty, however, it would have no significance under the Court's public forum analysis. The faculty is a part of the governmental body which administered the forum.

Even if the faculty were autonomous, limited use of a forum by a group closely related to the operation of an

educational institution does not create a public forum. See *Perry.* Although at some point access by a series of autonomous groups constitutes relinquishment of control, *Widmar v. Vincent,* 454 U.S. 263 (1981) (general use by student groups), limited use by a specific group is compatible with preservation of a non-public area. See *Perry* (union use), and *Cornelius* (use by "appropriate" voluntary organizations).

Petitioner also argues that the gallery is an "ideal example of a limited public forum" because it is "designed and dedicated to expressive activities" (Petition, p. 22). The Court has never held, however, that because a forum accommodates some expressive activity it necessarily becomes a public forum. In *Widmar,* the student union was not held to be a public forum because it accommodated some expressive activities, but rather because it had been generally opened for student use. In *Perry,* the interschool mail system remained a non-public forum despite its communicative nature because it had not been generally opened. The test, therefore, is not the ability of the forum to accommodate First Amendment expression, but the extent of its opening to uncontrolled, general use. As the Court said in *Perry:*

> If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA [petitioners] could justifiably argue a public forum has been created. *Id,* 460 U.S. at 47.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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